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THE MUSLIM LAW OF PRE-EMPTION

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PREFACE

Shuf'a, the Muslim Law of Pre-emption, has been developed out of a few *hadises*, traditions, of the Great Prophet of Arabia. Its foundation seems to be based on the broad principle, that all members of the society should attempt to preserve the joint nature of their ancient ancestral property. Hence it is contrary to the modern idea of freedom of alienation of property, and is a restriction on the individual rights of ownership.¹ It is very difficult to trace the origin of the Law of Pre-emption, but some sort of pre-emptive law is found to be prevalent almost in every part of the world. It was in existence in Babylonia² and

¹ There are some careful and well analysed observations made on this subject by Mr. Justice Mahmood in *Gobind Dayal v. Inayat Ullah* (1885), 7 All., 775; and by Dr. M. L. Agarwala, and recently by Mr. D. W. Kathalay in their works on the Law of Pre-emption.

² Simcox, Primitive Civilisation, Vol. I, p. 322.

Egypt.³ It was known to the Jews.⁴ It was prevalent under the Roman Law.⁵ It was within recent time in vogue in Germany,⁶ it is now found in Norway,⁷ in Sweden,⁸ in Switzerland,⁹ in Austria,¹⁰ in France,¹¹ in Italy,¹² in Spain,¹³ in Russia,¹⁴ in the United States of America,¹⁵ and also in England.¹⁶ It is also found in China¹⁷ and it was prevalent in Burma among the Buddhists,¹⁸ though it appears that there was no pre-emption under the Hindu Law.¹⁹

³ Ibid., p. 186.

⁴ Milman, History of the Jews, Vol. I, pp. 122, 195. Leviticus, Ch. 25, verses 10, 23—34.

⁵ Code 4, 66, 3. It is sometimes called *jus protimiseos* *vide Emphyteusis*.

⁶ The *jus retractus* of the German Law.

⁷ The Cambridge Mediæval History, Vol. II, p. 634. "In Norway the ödal land ought to remain in the kindred."

⁸ West and Buhler, Digest of Hindu Law, pp. 733, 734. Kathalay, The Law of Pre-emption, p. 24.

⁹ Laveleye, Primitive Property, pp. 62, 152.

¹⁰ Les Code Civilis E'tranger's Introduction, LXXVIII, Kathalay, The Law of Pre-emption, p. 25.

¹¹ Ibid., p. 238. The French Civil Code, Articles 1659—1661, 1673.

¹² Codice Civille Italian, Articles 1515—1528, diritto diriscatto.

¹³ Civil Code of Spain, 1637, Porto Rico, 1540. C. P. Sherman, Roman Law in the Modern World, p. 177.

¹⁴ Laveleye, Primitive Society, p. 152.

¹⁵ The right given by the Federal Public Land Laws repealed March 3, 1891.

¹⁶ Lands Clauses Consolidation Act, 1845, Sec. 128. Pre-emption as a Royal prerogative was surrendered by Charles II at his restoration, abolished by Statute 12, Car. 2, C. 24.

Vide The Small Holdings and Allotments Act, 1908, Sec. 12. Williams, Institutes of Justinian, p. 218.

¹⁷ Simcox, Primitive Civilisation, Vol. II, p. 358.

¹⁸ Manu Kyay, Book VII, Section 36. Chantoon, Principles of Buddhist Law, p. 131.

¹⁹ Agarwala, M. L., The Law of Pre-emption, Chapter 1. (Introductory.) D. W. Kathalay, The Law of Pre-emption, pp. 12—16.

The Law of Pre-emption is even found in the modern International Law.²⁰ However in all these countries the Law of Pre-emption was not developed as a scientific exposition of substantive law, it is only traceable in a vague form, whereas the Muslim Law of Pre-emption stands on a different footing. It is a highly developed and a scientific exposition of a very difficult branch of law. In fact no other system known to the ancient or modern jurisprudence has so well defined principles restricting the individual rights of property and yet in complete harmony with principles of equity, justice and good conscience. Indeed in this special branch of Muslim Law the Great Imam Abu Hanifa and his disciples have left a unique and distinct mark on the theory of jurisprudence.

In these few pages I have attempted to lay down in a codified form the principles of the Law of *Shuf'a*. I have based my conclusions on the recognised texts, and authorities like the *Fatawa-i-Alamgiri*, the *Fatawa-i-Kazi Khan*, the *Hedaya*, the *Durul-ul-Mukhtar* and the *Majma'-ul-Bahrain*. This work will be found to contain some original matter in the sense not hitherto mentioned by the authors of Anglo-Muhammadan Law, and in support of my view the translation and passages of the *Fatawa-i-Alamgiri* may be consulted and incorporated for ready reference. I hope the work will meet with the approval of those interested in the Muslim Law.

²⁰ The Manual of Naval Prize Law (1888), Art. 84.

THE MUSLIM LAW OF PRE-EMPTION

1. The right of pre-emption, *Shuf'a*²¹ means a right to be substituted in place of the transferee of some immoveable property by reason of such right.

Shuf'a means a right to acquire by compulsory purchase some immoveable property in preference to all other persons²² by reason of such right.

21. "The original meaning of *Shuf'a* is conjunction."

The Muslim Law of Pre-emption is administered by the Courts of British India on the ground of "justice, equity and good conscience." Spankie, J. in Chundo v. Alimoodeen, 6 N.W., 28 (1873) and Mahmood, J. in Gobind Dayal, 7 All. 775, (1884), insisted that the Muslim law of pre-emption should be treated under the Bengal, N.-W.P. and Assam Civil Courts Act as a "religious usage or institution," but the majority of the judges were not prepared to accept this view. The Muslim law of pre-emption is recognised to a limited extent in the Bombay Presidency and it is not recognised in the Madras Presidency even on the ground of equity and good conscience except in Malabar. In the Punjab, the law of pre-emption is regulated by the Punjab Pre-emption Act I of 1913. And in the North-West Frontier Province pre-emption is regulated by the Regulation II of 1906. In Oudh it is regulated by the Oudh Law Act XVIII of 1876. The recent Act regulating pre-emption is the Agra Pre-emption Act XI of 1922, as amended by Act VIII of 1923. All these enactments have almost abrogated the Muslim Law.

The Muslim Law of Pre-emption is frequently modified by local custom and is applicable among the Hindus by custom and under the *Wajib-ul-'arz*. In Bihar and Gujerat (Surat and Broach) a custom of pre-emption is recognised among the Hindus. Parasasth Nath v. Dhanai (1905), 32 Cal. 988; Fakir Rawat (1863), B. L. R., Sup. Vol. 35; Jadu v. Jani Koer (1908), 35 Cal., 575; Gordhandas v. Prankor (1869), 6 B. H. C. A. C., 263, but *vide* Dahya Bhai v. Chuni Lal (1913), 38 Bom., 183. A statement in the *Wajib-ul-'arz* is a good *prima facie* evidence of custom. A Muslim pre-emptor may lawfully base his claim in the alternative either on the Muslim Law or on the ground of custom. Abdul Hamid, 36 All., 573 (1914); 12 A. L. J. R., 966.

Wilson, pp. 373-374; Tyabji, pp. 651—669; Abbasi, pp. 3—16.

22. The right of pre-emption arises when there is a sale to a stranger, and the term stranger means in the pre-emption law a person who is neither a co-sharer nor a participator in the

The privilege of *Shuf'a* appertains to 'aqr,²³ that is immovable property.

2. The right of pre-emption appertains (i) to *Shaf'i-i-Sharik*, a partner in the property, owner of an undivided share, a co-sharer; (ii) *Shaf'i-i-Khalit* a participator in the immunities and appendages of the property²⁴;

appendages nor a neighbour to the subject-matter of pre-emption. A co-sharer who has concealed his interest (that is, there is a secret purchase, *bainami farzi*, in the name of another) cannot defeat the pre-emptive right of a *bona fide* co-sharer without any notice of the concealed purchase. Beni Shankar Shalhet v. Mahpal Bahadur Singh, 9 All., 481 (1887).

²³ Sircar, T. L. L. (1873), p. 509; T. L. L. (1874), p. 444; Baillie, Part I, p. 478; Agarwala, p. 31.

The subject of pre-emption must be 'Aqr and that which comes within the meaning of the term 'Aqr. 'Aqr means immovable property. 'Aqr includes land whether arable or pasture, mansions, vineyards, gardens and enclosures, e.g., a bath well. Under the *Shaf'i* Law there is no pre-emption in indivisible things but under the *Hanafi* Law there is pre-emption in the case of a bath, a well and a mill. The *Maliki* jurists agree with the *Hanafi* view. It includes agricultural land. Shaikh Jahangir v. Lala Bhekari Lal, 6 B.L.R., 42; 11 W.R., 71. It extends to a whole village. S.D.A., Cal., Vol. III, 85. Moveables if they are accessories are included in the term 'Aqr. There is no pre-emption if trees or buildings are purchased with a view to removal, they are not included within the term 'Aqr. It is otherwise if the trees are purchased with the ground on which they stand.

²⁴ Baillie, Part I, p. 481; Sircar, T.L.L. (1873), p. 514; Hamilton Hedaya (Grady), p. 548; Ameer Ali, Vol. I, p. 717; Dayal, p. 382; Abbasi, p. 78; Agarwala, p. 66; Wilson, p. 380; Tyabji, pp. 702—704.

In Chand Khan v. Nizamat Khan (1869), 3 B.L.R.A.C., 296, it was held that the owner of the land through which the land subject of pre-emption, receives irrigation has a preferential right to a mere neighbour. It is necessary that the road in common enjoyment must be a private road and not a thoroughfare. All *Khalits* have equal rights of pre-emption. It makes no difference if one of them happens to be a contiguous neighbour. Rahim Baksh v. Khuda Baksh, 16 All., 247.

The right of *Shuf'a* is recognised in the private right of water *sharb-khas* and in private right of way *tarik-khas*. As a rule a *khalit* in way, and a *khalit* in water have equal rights but a *khalit* in way is preferred to a *khalit* who has the right to the water conducted through another's field.

(iii) *Shafi'-i-jar* a neighbour, owner of contiguous immoveable property, a pre-emptor by right of vicinage.²⁵

A mere tenant upon the land as such has no right of pre-emption, Gooman Singh *v.* Tripor Singh, 8 W.R., 437, nor can a mere possessor with no legal title, Beharee Ram *v.* Musammat Sheobhudra, 9 W.R., 455. The owner of a dominant tenement may lawfully pre-empt the servient tenement, his claim is preferred to that of a neighbour. And likewise the owner of the servient tenement in respect of the sale of the dominant tenement is preferred to a mere neighbour; Ranchoddas *v.* Jugal Das (1899), 24 Bom., 414; Karim *v.* Priyo Lal (1905), 28 All., 127; 2 A.L.J.R., 619. However a *khalit* is not necessarily an owner of dominant or servient tenement.

If a *Shafi'-i-khalit* happens to be a *Shafi'-i-jar* also but as such he has no preferential claim to pre-empt the whole property as against a vendee who is also a *khalit*. In such a case the property is equally divided. Muhammad Yakub *v.* Kanhai Lal, 19 A.L.J.R., 869 (1921); 44 All., 83.

It is maintained that among rival neighbours proximity to the property in question gives preference to one over the other but *vide* Syeeduddin *v.* Latifunnissa, 19 A.L.J.R., 909, where the Court held "that the Muhammadan Law of Pre-emption does not recognise degrees of nearness within the same class of pre-emptor." This view is correct as regards *sharik* and to some extent even in the case of *khalit* but it is not correct in the case of *Shafi'-i-jar*.

The expressions *Shafi'-i-sharik*, *Shafi'-i-khalit*, *Shafi'-i-jár* have been adopted by the commentators of Anglo-Muhammadan Law. The Arabic word *khalit* denotes both classes of pre-emptors, co-sharers and participators in easements.

²⁵ A neighbour in the land on which a common partition wall stands is preferred to all other neighbours, in fact under the *Hanafi* Law he is deemed to be a partner.

The right of pre-emption by vicinage applies to small plots of land and enclosures. It does not apply to large estates. Abdul Azim *v.* Khondkar Hamid Ali, 2 B.L.R.A.C., 63; 10 W.R., 356; Ejnas Kooer *v.* Shiekh Amjad Ally, 2 W.R., 261; Roshun Mahomed *v.* Mahomed Kalim, 7 W.R., 150, etc. In Mahomed Husain *v.* Mohsin Ali, 14 W.R.F.B., 1; all authorities were closely examined. Where a *mahal* is divided into two or more separate *mahals* no right of pre-emption exists merely on the ground of vicinage. Abdul Rahim Khan *v.* Kharag Singh, 15 All., 104, 12 A.W.N., 240. Suppose there were certain common appurtenances to the original *mahal* and were enjoyed in common by all on division of the *mahal* even then there is no right of pre-emption by reason of such common appurtenances. Naziruddin *v.* Kadir Baksh, 14 A.W.N., 193. However a partner in a big estate has a right to pre-empt when one of the co-sharers of

The *Jar-i-mulaziq*, contiguous neighbour, has preferable right of pre-emption among all *Shafi'i-jar*, next the *Jar-i-mulasiq*, the neighbour behind, the mansion has the right of pre-emption.

In case of competition the first class excludes the second and second excludes the third.

According to the *Fatawa-i-'Alamgiri* the *Shafi'i-jar* must demand pre-emption immediately on hearing of the sale and not wait till the *Shafi'i-sharik* has surrendered his right, otherwise he will forfeit his right of pre-emption.

Under the *Shi'a* Law²⁶ there is no right of pre-emption if there are more than two co-sharers and there is no right of pre-emption on the ground of participation in the appendages nor on the ground of mere vicinage. Under the *Shafi'i* Law pre-emption can only be claimed on the ground of partnership.

3. The rights of all pre-emptors of one and the same class are equal, and they are entitled to equal shares *per*

such estate sells his share. *Sheikh Karim Baksh v. Kamurddin Ahmad*, 6 N.-W.P. H.C.R., 377.

²⁶ Baillie, Part II, p. 175 (*Sharaya-al-Islam*); Ameer Ali, Vol. I, p. 737; Sircar, T.L.L. (1874), pp. 443—462; Abbasi, pp. 111—120. The *Shi'a* Law of Pre-emption is recognised by the Indian High Courts *vide* Abbas Ali, 12 All., 229 (1889); Rajah Deedar Hossein, 2 Moo. Ind. Ap., 441; Qurban Husain, 22 All., 102 (1899).

In Pir Khan, 36 All., 488 (1914). A *Shi'a* sold some property to the vendees who were Hindus. A *Sunni* pre-emptor claimed to pre-empt the property. The *Shi'a* vendor succeeded on the ground that there was no right of pre-emption for there were more than two co-sharers. It seems that according to the Allahabad High Court the *Shi'a* Law of pre-emption is to apply when both the vendor and the pre-emptor or either of them is a *Shi'a*. The Calcutta High Court in Jog Deb Singh, 32 Cal., 982 (1905) allowed the *Sunni* law to prevail where the vendor was a *Shi'a* and the pre-emptor was a *Sunni*.

The rule of *Shi'a* law that there is no right of pre-emption if there are more than two co-sharers is now firmly noted in the decisions of the Indian High Courts, however there are some passages in Querry Droit Musalman, Vol. II, pp. 275—278 *vide*

capita, but under the *Shafi'i* law they are entitled to receive shares in proportion to the extent of their own shares.

4. It appears that according to the High Court of Allahabad both the seller and the pre-emptor must be Muslims, and the personal law of the purchaser is of no consequence. That the *Shi'a* law of pre-emption is to apply when both the vendor, and the pre-emptor or either of them is a *Shi'a*. According to the Calcutta High Court the vendor, the vendee and the pre-emptor should all be Muslims.²⁷

also D.W., Kathalay, the Law of Pre-emption, p. 58, which indicates the contrary view and it is the same as the *Hanafi* Law.

²⁷ Ameer Ali, Vol. I, p. 728; Wilson, p. 382; Tyabji, pp. 663, 664; Abbasi, p. 33.

(a) Personal Law of the vendor:—

The seller must be governed by the law of pre-emption, e.g., if a non-Muslim sells some property then there is no pre-emption under Anglo-Muhammadan Law.

(b) Personal Law of the vendee:—

If a Muslim sells some property to non-Muslim, according to Allahabad High Court there is pre-emption under the Muslim Law. *Gobind Dayal v. Inayat Ullah*, 7 All., 775. But according to Calcutta High Court there is no pre-emption at all. *Kudrat Ullah v. Mahini Mohan Shaha* (1869), 4 Beng. L.R., 134: 13 W.R., 21.

(c) Personal Law of the pre-emptor:—

The pre-emptor must be a Muslim to claim pre-emption under the Muslim Law. A *Shi'a* however cannot claim pre-emption on the ground of vicinage, even if the seller and purchaser were *Sunni* Muslims. *Qurban Husain*, 22 All., 102. But *vide Rokaiya Begam v. Ahmadi Khanum* (1912), 9 A.L.J.R., 769, where a purchaser a *Shi'a* woman was allowed to defend the suit on the ground that she was a *Shafi'i-khalit* and the *Sunni* pre-emptor was also a *khalit* and the pre-emptor's contention that under the *Shi'a* law *khalits* have no right of pre-emption was rejected by the Court.

According to previous decisions of the Allahabad Court the right of pre-emption could be enforced even if the seller was a Hindu. *Chundo v. Hakeem Alimoddeen* (1873), Agra F.B., 305; 6 N.-W.P., 28. The last case was overruled in *Dwarka Das*, 1 All., 564 (Stuart, J. and Pearson, J. dissenting); but there is

However under the *Hanafi* Law a Muslim pre-emptor is entitled to pre-empt the property irrespective of the fact whether the vendor and vendee are both or either of them is a non-Muslim.

5. The right of pre-emption takes place when some property subject to pre-emptive right is transferred by a valid sale,²⁸ or by some means equivalent to a valid sale.

no doubt that the earlier cases were in conformity with the Muhammadan Law. As regards Bihar it has been held by the Privy Council in *Jadu Lal Sahu v. Janki Koer*, 9 A.L.J.R., 525, 39 I.A., 101; that "in Bihar the right of pre-emption under the Muhammadan Law is enforceable irrespective of persuasion of the pre-emptor, vendor and vendee."

Under the *Hanafi* Law a Muslim and a *Zemmi* (non-Muslim) are on equal footing in all cases regarding the privilege of pre-emption, and according to the *Shi'a* Law a non-Muslim may lawfully exercise the right against a non-Muslim but not against a Muslim.

²⁸ According to the Muslim Law sale means commutation of goods for goods, goods for money, of money for money, of money for goods. Sale is contracted by declaration and acceptance, the subject and consideration of sale must be determinate and the subject must be in actual existence. The Muslim Law does not prescribe any particular form for a sale transaction, but immediate delivery is necessary in the case of commutation of goods for goods and money for money and in the case of money for goods and goods for money a future period of delivery may be lawfully stipulated. There are five conditions which are natural to a contract of sale: (1) Option of acceptance, (2) condition of option, (3) option of determination, (4) option of inspection, (5) option from defect. If any extraneous condition is stipulated it makes the transaction an invalid sale. Hence the conception of sale under the Muslim Law is wider than the conception of sale under the Transfer of Property Act, Section 54, in fact it includes the definition of exchange as defined in Section 118 of the Transfer of Property Act. In *Begum v. Muhammad Yaqub*, 16 All., 344., F.B. citing original authorities the Allahabad High Court has held that the sale must be complete according to the Muslim Law. However in this very case Mr. Justice Banerji took the contrary view, and similar view was expressed by Mr. Justice Mahmood in *Janki v. Girjadat* (1884), 7 All., 482 F.B. The Calcutta High Court in *Budhai Sardar v. Sana Ullah* (1914), 41 Cal., 943 and the Patna High Court in *Kheyali v. Mullick Nazarul Alum* (1916), 1 Pat. L.J., 174, did not accept the view of the Allahabad High Court and held that Sec. 54 of the Transfer of Property Act embodies the general law which is paramount and supersedes the Muslim Law. In *Abdullah*

There must be an exchange of property for property or money and there must be an entire cessation of the vendor's interest.

6. There is no right of pre-emption in an invalid sale²⁹ so long as the invalidating circumstances or conditions

v. Ismail (1922), 46, Bombay, 302, the Bombay High Court preferred the view of the Allahabad High Court and held that a right of pre-emption arose in the case of an oral agreement to sell followed by payment of price and delivery of possession to the vendee even though no registered sale-deed was executed. It seems that the difficulty could be solved in each case by determining the actual intention of the parties *vide Sitaram v. Jiaul Hasan*, 45 Bom., 1056 (P.C.). However as a matter of fact almost all transfers of property are generally made in conformity with the provisions of the Transfer of Property Act, and they are duly executed and registered.

It should be noted that the view taken by the Allahabad High Court would cover all instances of fraudulent omission to register. If the ostensible sale is really fictitious then the ownership remains with the vendor, *Mansur Ali v. Haider Husain*, 4 A.W.N., 128.

When the property is to be exchanged for some perishable object or for articles of quantity or measures of weight then the pre-emptor is entitled to give its value in lieu of it.

²⁹ Baillie, Part I, p. 476; Sircar, T.L.L. (1873), pp. 512-513; Abbasi, p. 24.

It is to be determined under the Muslim Law as to what is an invalid sale, as for instance by reason of uncertainty in price or the time for delivery of the property sold. *Najam-un-nissa v. Ajaib Ali*, 22 All., 343 is a good case to illustrate what is an invalid sale and its effect on ownership of the vendee. The facts are that Aminullah sold a house and site to Ajaib Ali stipulating Rs. 84 for the site and a further sum for the house to be ascertained by carpenters or masons appointed by the vendor and the vendee, and upon the additional sum being paid possession of the house would be made over within 10 days. This transaction took place by a registered contract of sale on the 17th May, 1895. Abrar Husain, the owner of adjacent houses, sold his property to Najam-un-nissa on the 14th July, 1896. Ajaib Ali instituted a suit for specific performance and eventually obtained possession of the house on the 6th of September, 1896. Najam-un-nissa and Ajaib Ali sued one another, each claiming a right of pre-emption against the other. The Court held quite correctly. That Ajaib Ali did not become owner of the house purchased by him until the 6th September, 1896, and therefore he was not entitled to claim pre-emption against Najam-un-nissa when she purchased her houses on the 14th July, 1896, and that Najam-un-nissa was entitl-

continue to exist. The right of pre-emption arises when the vendee exercises his right of ownership, and obtains possession of the property or erects a building or plants trees on it.³⁰ However in no case ownership relates back to the date of the original contract for sale or of sale. The ownership of the vendee dates from the date of his taking possession of the property.

There is no right of pre-emption in a sale with reservation of an option of repudiation for the vendor,³¹ until the option drops, but there is a right of pre-emption in a sale under a condition of option to the vendee, for in the latter case there is a complete extinction of the vendor's interest.

If the sale is subjected to the option of a third person then the right of pre-emption arises after the sale is confirmed by him.

7. The right³² of pre-emption does not arise out of

ed on the sale to Ajaij Ali becoming complete on the 6th September to claim pre-emption against him.

³⁰ According to the *Fatawa-i-'Alamgiri* the mere fact of taking possession is not sufficient at all, it mentions the case of erecting a house along with taking possession.

³¹ If a certain property was sold subject to the option of the vendor and subsequently an adjacent house to this property is sold, then the vendor is entitled to pre-empt the house because the vendor's interest in the property sold has not yet ceased; but if the property was sold subject to the option of the vendee then the vendor is not entitled to claim pre-emption and in this case the vendee may lawfully pre-empt the house.

Similarly if a certain property was sold by an invalid sale then if the property was still in the possession of the vendor he is entitled to pre-empt an adjacent house sold to this property, and the vendee is not allowed to pre-empt it. But if the property was in the possession of the vendee he may lawfully claim pre-emption, and in this case the vendor has no right to claim pre-emption.

³² Baillie, Part I, p. 475; Wilson, pp. 389-390; Agarwala, p. 19.

Property alienated by a simple gift is exempted from pre-emption, but in the case of gift amounting to sale or disguised as a sale, pre-emption is permitted. *Angan Lal v. Muhammad Husain*, 13 All., 409 F.B.

inheritance, gift, *sadaqa* (pious gift) bequest,³³ *waqf*³⁴ (charity) and lease.³⁵

In the case of gift with a condition of return *Hiba-bi-shartil-iwaz* after possession has been taken on both sides the right of pre-emption arises.

8. In the case of mortgage the right of pre-emption arises after the equity of redemption has been foreclosed.³⁶

If A makes a gift of property to B and B subsequently makes a gift of his own property to A, then no right of pre-emption arises. This is *Hiba-bil-iwaz*. It is a mere exchange of presents.

If A makes a gift and there is a distinct understanding that B is to make a return this transaction amounts to an exchange, *Hiba-bi-shartil-iwaz*. This right of pre-emption arises. But if B fails to make the stipulated return or A refuses to accept the return (whether A has the right to refuse is a doubtful point) then the transaction amounts to a simple gift and there is no pre-emption. To fall under *Hiba-bi-shartil-iwaz* it is essential to stipulate for the return. 6 S.D.A., Beng., 34.

³³ If a person makes a *wasiyat* that the income of a certain property should be given to A, and the property itself to B, then if the adjoining house to this property is sold then B (and not A) only can claim to pre-empt that house.

³⁴ There is no pre-emption as regards *waqf* property, and there is no pre-emption in favour of *waqf* property. There is a Punjab ruling to the effect that the *Mutawalli* of a mosque could pre-empt. *Jind Ram v. Hussain Baksh*, 49 Punjab Rec. 197 (1914). This decision was however under the statutory law although it was discussed as a question of Muhammadan Law.

³⁵ *Mooroolee Ram v. Haree Ram*, 8 W.R., 106.

The rent reserved was only one rupee per annum. *Ram Golam v. Narsingh*, 25 W.R., 43 and *Dewanutullah v. Kureem Molla*, 15 Cal., 184. But dressing up a sale in the garb of a lease cannot defeat the right of pre-emption. *Muhammad Niaz*, 40 All., 322 (1918).

³⁶ *Wilson*, p. 390; *Agarwala*, p. 34; *Tyabji*, p. 674.

If the mortgage be such that a decree for sale would be passed then the right of pre-emption arises when the sale becomes absolute under Order 34, Rule 5 or 8 of the Civil Procedure Code. The leading cases are: *Batul Begam v. Mansur Ali Khan*, 20 All., 315 F.B.; affirmed by the Privy Council in 24 All., 17; approved by the Punjab Chief Court F.B., in P.R. (1901), No. 103, *Ali Abbas v. Kalka Prasad*, 14 All., 405 F.B.

It has been held that the cause of action arises on the expiration of the year of grace and that till then the pre-emptor is to wait. No right of pre-emption arises if the mortgagor remains

If a mortgagor sells the mortgaged property with its encumbrances or the equity of redemption the right of pre-emption arises.

In the case of release from debt the right of pre-emption arises, e.g., where a debtor gives some property to his creditor on condition that he shall release him from the debt.³⁷

9. There is no right of pre-emption in the case of partition of the property amongst co-sharers of a certain undivided immoveable property.³⁸

in possession of the property under an agreement arrived at before the expiration of the period of foreclosure. If an *ex parte* decree was passed, and a suit for pre-emption was instituted, and subsequently the *ex parte* decree is set aside and the mortgagor pays the amount, then the suit of pre-emption should be dismissed.

In the case of mortgage by conditional sale the right of pre-emption arises when the conditional sale becomes absolute. Ajaib Nath (1888), 11 All., 164. The pre-emptor may show that an ostensible mortgage is in fact a sale transaction, P.R. (1904), No. 78 and P.R. (1906), No. 145.

³⁷ In the case of assignment of property for payment of debts if the property is made over in complete discharge of the debts then such a transaction practically amounts to a sale. When however the property is handed over to the trustees to manage the property and pay off the debt and then return the property to the debtor, it is not a sale and there is no pre-emption. Outar Singh *v.* Musammat Ablakhee, 2 Agra, 328.

³⁸ Tyabji, p. 706, and Agarwala, p. 68.

Partition ends the right of a *sharik*, it destroys co-parcenary body. To extinguish the partners' right of *Shuf'a* it is necessary that a formal division has taken place. For instance if the separation is merely of rent then it is not enough. In Karam Ali *v.* Amir Ali, 3 C.L.R., 166, two co-sharers paid rent separately to the zamindar by arrangements though the lands continued joint. The Court held that such a partition did not destroy their mutual rights of pre-emption. Similarly in Gureebullah Khan *v.* Kebul, 13 W.R., 125, the Court held, that where two co-sharers were merely paying rents separately in respect of an original *jama*, the right of pre-emption *inter se* existed. However if each partner is made owner of his share and the boundary of each partner is marked and defined then the right of *Shuf'a* is completely destroyed. Wahid Ali *v.* Hunoman, 12 W.R., 484. A divided co-sharer cannot claim *Shuf'a* on the ground of *Shafi'-i-khalit*. Mahadeo Singh *v.* Zait-un-nissa, 7 B.L.R., 45; 11 W.R.,

10. There is no right of pre-emption in the property assigned by a husband to his wife as her dower, but a transfer of property in lieu of the dower-debt itself does give rise to the right of pre-emption.³⁹

Where a marriage was contracted without dower having been agreed, and thereafter the husband transfers some property in lieu of *Mahr-ul-misl*, dower of her equals the right of pre-emption arises. However if the husband transfers some immoveable property to his wife in lieu of relinquishment of her right to claim dower then the right of pre-emption does not arise.⁴⁰ If the wife, to obtain a *khulla* divorce, assigns immoveable property to her hus-

169. Perfect partition divides one *mahal*. Lala Puriag Dutt v. Bunde Hossein, 15 W.R., 225, on review, 16 W.R., 110.

³⁹ Agarwala, p. 23; Sircar, T.L.L. (1873), p. 511; Wilson, p. 390; Tyabji, p. 669; Ameer Ali, Vol. I, p. 713.

Fida Ali v. Muzaffar Ali, 5 All., 65. 2 A.W.N., 175. Following Peare Begum v. Sheikh Hushmat Ali, N.W.R.S.D. A.R., 1864, Vol. I, p. 475. Where it was held—"Price as a term of Muhammadan Law includes not only money, but also any other kind of property capable of being valued at a definite sum of money. But when a transfer of property takes place for a consideration not capable of being estimated at a definite money value such transfer is not regarded as sale at all and does not give rise to the right of pre-emption. Therefore when a man marrying a woman does not fix the amount of dower at a money value, but assigns property to her as her dower, the right of pre-emption cannot have any operation the transfer not being a sale and the consideration thereof being unascertained and unascertainable at a definite money value. But no such impediment to the operation of the right of pre-emption exists in cases in which the dower was originally fixed at an ascertained sum and the property is subsequently sold in lieu of a part or the whole of such amount."

⁴⁰ This is an instance of *Hiba-bil-iwaz* and consequently the right of pre-emption does not arise.

In Ram Prasad v. Rahat Bibi, 18 O.C. 367, a Muhammadan transferred some property to his wife in lieu of relinquishment of her claim to dower it was held that the transaction was not one of sale but of *Hiba-bil-iwaz*. There was an exchange of gift. The husband gave certain property and the wife gave relinquishment of her claim to dower.

According to the Egyptian Act of 1900, Art. 3, a sale between husband and wife or between ascendants and descendants or

band the right of pre-emption does not arise. Under the *Shafi'i* Law the right of pre-emption arises in all these cases.

11. Under Anglo-Muhammadan Law, there is no pre-emption if a transfer is effected by a decree:

there is a difference of opinion whether a sale in execution of a decree gives rise to a right of pre-emption⁴¹;

there is no right of pre-emption upon a transfer effected by virtue of a compromise decree in a pre-emption suit.⁴²

According to the *Hanafi* Law it is submitted that in such cases a right of pre-emption arises.

between relations within three degrees is not pre-emptible. Andre Marneurs' *La Chefa*, p. 75.

A widow in possession of her deceased husband's property in lieu of her dower is not owner of the property for her possession is determined on payment of the dower debt, or by satisfaction of the dower debt from the income of the property; therefore she by reason of her possession cannot claim pre-emption. *Khairunnissa v. Amin*, 7 A.W.N., 93. But if the widow was in possession of the property partly as her share by right of inheritance then on the latter ground she can lawfully exercise her right of pre-emption. *Nabi Bax v. Medu*, 2 A.L.J.R., 775.

⁴¹ *Tyabji*, p. 670. For the affirmative, *Imam Ooddeen Sowdagar v. Abdul Sobhan* (1866), 5 W.R., 169; where part of an estate is sold in execution of a decree a co-sharer is entitled to the right of pre-emption. In the negative, *Nuzmooddeen v. Kanye Jha* (1863), Marsh, 555, 2 Hay, 651, *Abdul Jalil v. Khellat Chunder Ghose* (1868), 10 W.R., 165, because the partner or neighbour had an opportunity to bid at the sale.

⁴² *Hanuman Rai v. Udit Narain*, 7 All., 917, and *Abdul Razaq v. Mumtaz Husain*, 25 All., 334, support this view. In the latter case the Court held "Pre-emptive right is a right to step into the shoes of a less qualified vendee or transferee and therefore there must be such a person acquiring property by a contractual relation of sale or transfer." The Punjab Court has taken the same view. *Khiman v. Alladad*, 18 I.C., 957; but in this case the pre-emptor was not a party to the compromise decree. The facts are M and A sold certain land to Alladad Khan whereupon Mustafa Husain instituted a suit for pre-emption. The parties arrived at a compromise, the vendee agreeing to give up to Mustafa Khan a part of the land on payment of Rs. 400, later on Khiman instituted the present suit to pre-empt the land which Mustafa Khan obtained in virtue of the agreement. The

According to the *Hanafi* Law a transfer effected by the decree compounding a claim gives rise to the right of pre-emption. If a person claims ownership of a certain property and the owner compounds the claim by paying a certain sum, then it amounts to an admission and is equivalent to sale, and the right of pre-emption arises. But if the owner neither admits the claim nor denies it, but to save the bother of litigation, pays the amount, then in this case there is no right of pre-emption.

12. The right of pre-emption is not established unless the pre-emptor on hearing of the transfer from some trustworthy source makes the demands of pre-emption in the following order⁴³ :—

The demands are of three kinds⁴⁴ :

1. *Talab-i-muwasabat* or immediate demand.

case was under the Punjab Pre-emption Act, but the suit was dismissed on the support of the Allahabad decision. However it is submitted that under the *Hanafi* Law the property could be pre-empted. In *Intizar Husain v. Jamna Prasad*, 1 A.L.J.R., 247, it was again held that a right of pre-emption does not arise upon a transfer effected by virtue of a decree though the decree is passed upon a compromise. Under the *Hanafi* Law of Pre-emption it can in my opinion be successfully argued that such a compromise decree resembles the accepted case compounding a claim for consideration where the right of pre-emption arises. A claims ownership of a house. B compounds the claim by payment. This amounts to a sale, hence the right of pre-emption arises in favour of the pre-emptor. However this example is a general one. I disagree from the view taken in 1 A.L.J.R., 247 and 18 I.C., 957, but I support 7 All., 917 and 25 All., 334 for these decisions are clear as the claim was made by the pre-emptors who happened to be parties to the compromise decree itself, and this fact obviously bars their subsequent demand to claim pre-emption.

⁴³ Baillie, Part I, p. 487; Sircar, T.L.L. (1873), pp. 520—527; Ameer Ali, Vol. I, p. 724; Dayal, p. 386; Abbasi, p. 88; Agarwala, p. 95; Wilson, 394; Tyabji, pp. 682—688.

That is on hearing from two men or one man and two women; or one trustworthy man, or from the vendee or vendor's agent or by a letter.

⁴⁴ Strictly speaking this is a branch of the Muslim Law of procedure and the courts in British India should not be bound by technical rules of the Muslim Law. The justification for the

2. *Talab-i-ishhad* or *'Istishhad* or demand with invocation also known as *Talab-i-taqrir* confirmatory demand.
3. *Talab-i-tamlik* or demand of possession also known as *Talab-i-khusumat* or demand by litigation.

The demands of pre-emption may be made by the pre-emptor himself or his authorised agent or his lawful guardian if he be a minor, or by the manager of a Court of Wards.⁴⁵

The distinction between *Talab-i-muwasabat* and *Talab-i-ishhad* is not recognised by the *Shi'a* law, all that is necessary is that the pre-emptor should prefer his claim.

Under Anglo-Muhammadan Law, the fraudulent or otherwise omission to register the sale-deed does not affect the demands of pre-emption which could be made immediately after the execution of the deed, and they are also valid if made after registration of the sale-deed, as required by Sec. 54 of the Transfer of Property Act.⁴⁶

13. The *Talab-i-muwasabat* should be made without the least possible delay, in fact, immediately after the fact of transfer of property comes within the knowledge of the

demands and invocation of witnesses as required by the *Hanafi* law, has as a matter of fact now ceased to exist.

⁴⁵ *Jadu Lal v. Janki Koer*, 1908, 35 Cal., 575; 39 Cal., 915; 39 I.A., 101.

⁴⁶ In *Zamani Begum v. Khan Muhammad Khan* (1923), 46 All., 142, it was held that the demands made after the execution of the sale-deed but before registration were not premature or defective. In *Budhai v. Sanullah* (1914), 41 Cal., 943, the pre-emptor after the execution of the sale-deed did not make the demands of pre-emption, it was held that he was not bound to make the demands, and that his right did not arise till he became aware of the registration of the sale-deed.

pre-emptor,⁴⁷ and any words indicative of intention to pre-empt the property are sufficient.⁴⁸

14. The *Talab-i-ishhad* should be made with the least possible delay.⁴⁹

(i) In the presence of witnesses called upon to bear witness to it ;

(ii) on the premises, the subject of pre-emption, or

⁴⁷ In *Ali Muhammad v. Taj Muhammad*, a delay of 12 hours was held to be too long. In *Amjad Hossein* case, 4 B.L.R. A.C. (1870), it was held that a pre-emptor may take a *short time* to ascertain the information conveyed to him before making the *Talab-i-muwasabat*.

According to the Maliki School the pre-emptor can spend one hour for inspecting the subject of sale before making the demand of pre-emption. Code Musalman, section 900; D. W. Kathalay, The Law of Pre-emption, p. 134.

⁴⁸ Followed in *Muhammad Nazir Khan*, 34 All., 53 (1911), distinguishing *Muhammad Abdul Rahman Khan*, 8 A.L.J.R., 270 (1903).

Whether the *Talab-i-muwasabat* may be made through an agent is a disputed question. According to the Bengal Sadar Dewani Adalat the performance of the first demand through another is not a valid compliance with the law. *Moyemoodden v. Thlarodeen* (1847), Ben. S. D. A.R., 267, *Meer Syed Alee v. Sheikh Muhammad* (1857), 13 Ben. S.D.A.R., 1172. The Allahabad High Court has however held that the first demand can be made by a general attorney. In *Munna Khan v. Cheeda Singh* (1906), 28 All., 690, the demand was made by the brother of the pre-emptor *vide also Abadi Begum*, 1 All., 521.

⁴⁹ According to Imam Muhammad *Talab-i-ishhad* must be made within three days; according to Imam *Shafi'i* there is no limitation at all *vide the Majma'-ul-Bahrain*.

It is submitted that what is the least practicable delay is a question of fact to be determined in each particular case.

In *Nathu v. Shedi*, 37 All., 522, 13 A.L.J.R., 714, it was held, that if at the time of *Talab-i-muwasabat* the pre-emptor invoked witnesses in the presence of vendor or vendee or on the premises to attest the immediate demand it would be sufficient and *Talab-i-ishhad* was not necessary. This is according to the *Durrul Mukhtar* also.

In *Inayat Khan v. Muhammad Yosuf*, 10 A.L.J.R., 92, it was held that in the case *Talab-i-ishhad* is made before the seller who was not in possession of the property the demand was not made properly.

in the presence of the vendor provided he is in possession of the property, or before the vendee.

It is also necessary to refer to the *Talab-i-muwasabat* having been duly made.⁵⁰

Talab-i-'ishhad may be made by a duly appointed agent.⁵¹

15. The above preliminary demands having been made, the pre-emptor must make *talab-i-tamluk*, that is, file the suit in a Court of Justice⁵²

(i) within a year of the purchaser taking possession of the property, and

(ii) where the subject of the sale does not ad-

In *Muhammad Khalil v. Muhammad Ibrahim*, 14 A.L.J.R., 148, 38 All., 201, it was held that *Talab-i-'ishhad* cannot be made by a letter where it was possible for the pre-emptor to make the same personally.

⁵⁰ This point was fully discussed in *Rujjab Ali Chopdar v. Chund Churn Bhadse*, 17 Cal., 543 F.B. *Akbar Husain* 16 All., 383 (1894); *Abbas Begum*, 20 All., 457 (1898), *Abid Husain*, 20 All., 499, and *Mubarak Husain*, 27 All., 163 (1904).

In *Ahmad Hakim v. Mohammad Hikmat Ullah*, 25 A.L.J.R., 312 (1927), the pre-emptor omitted to ask the witnesses to bear testimony. It was held that the omission was not fatal.

⁵¹ *Talab-i-'ishhad* may be performed by an agent duly appointed. He may write a letter appointing an agent, *Wajid Ali Khan*, 4 B.L.R.A.C., 139 (1870); *Imamuddin*, 6 B.L.R., 167; *Abadi Begum*, 1 All., 521 (1877); *Ali Muhammad Khan*, 18 All., 309 (1896). But a letter direct to the vendor or vendee is not sufficient. *Muhammad Khalil*, 38 All., 201 (1916). Any act or omission by the agent has the same effect as that by the pre-emptor himself.

⁵² Limitation Act IX, 1908, Schedule II, Art. 10. The Limitation Act supersedes the Muhammadan Law.

The starting point for limitation is when "physical possession" (the term used in Art. 10 of the Limitation Act) is taken of the whole property; if the property is not susceptible of physical possession then from the time of the registration of the sale-deed. In this case Art. 120 will apply—*Ali Abbas v. Kalka Prasad*, 14 All., 405, *Batul Begum v. Mansur Ali*, 20 All., 315; affirmed in 24 All., 17 P.C. In the latter case the term "physical possession" was fully discussed.

mit of physical possession within a year of registration of the instrument of sale.

The vendee is a necessary party to the suit, but the vendor is not a necessary party to the suit unless he is in possession of the property.

16. (i) A pre-emptor need not tender the purchase-money at the time of asserting or demanding pre-emption. It is sufficient that he is prepared to pay the sale consideration stated in the deed, or if he suspects it then the amount determined by the Court should be paid by him.⁵³ The sum decreed need not be paid if the pre-emptor prefers an appeal. The pre-emptor is not liable to the vendee for any such contingent charges as brokerage or agency.

According to Imam Muhammad the period for instituting the suit is one month except under lawful excuse. The period of limitation fixed by the Indian law agrees with the one year limit of Imam Malik.

Where a suit was instituted on the last date allowed by pre-emption and subsequently amended it was held not to be time-barred—Muhammad Sadiq, 33 All., 616 (1922).

A, B and C were joint owners of a share; C was a minor. A and B sold the entire property to D. Then E sued A, B and D for pre-emption and obtained a decree and possession of the property. C then brought a suit and recovered his share. C then sued E for pre-emption. Held that the time began to run against C from the date of the original sale to D, that the suit was barred under Art. 10, Act XV of 1877. Yawar Husain v. Abdul Kadir, 2 A.L.J.R., 151.

The pre-emptor instituted a suit against A and B on the 27th February, 1909, on the allegation that they had jointly purchased the property, subject of pre-emption, by a sale-deed on 3rd April, 1908. As a matter of fact the name of one of the vendees was C and not B. Hence on the 8th of April C was made a party to the suit as defendant. Held that the suit against C was barred by limitation and that since the sale was joint the suit was barred against A also. Mamraj Singh v. Hirday Ram, 8 A.L.J.R., 814. Vide also Mehdi Hasan, 13 A.L.J.R., 383.

⁵³ Baillie, Part I, p. 494; Wilson, p. 400; Agarwala, p. 104.

Nubee Baksh v. Kaloo, 22 W. R., 668; 1 A. W. N., 44; Khoffejan v. Mahomed Mehdee, 10 W.R., 211. *Prima facie* the consideration in the sale-deed should be taken as the true consideration. Under Anglo-Muhammadan Law, there is no objection

(ii) If after valid sale the vendor has reduced the price then the pre-emptor is entitled to claim the benefit of this abatement.⁵⁴ If the vendee on discovering a pre-existing defect does not avoid the sale, but elects to demand compensation from the vendor then the pre-emptor is also entitled to abatement thus effected in the price.

Under the *Shi'a* Law the pre-emptor is not entitled to the benefit of the abatement.⁵⁵

(iii) If after a valid sale the vendor foregoes the entire sale consideration in favour of the vendee, then the pre-emptor cannot claim the benefit of the whole remission, but he is entitled to pre-empt the property at its original price.⁵⁶

(iv) If after a valid sale the vendee increases the sale consideration in favour of the vendor then the pre-emptor is not liable for such augmentation.

(v) If the vendor has sold the property on credit⁵⁷ to the vendee then the pre-emptor may either wait, until the period has expired and then pre-empt the property, or he may take the property immediately on payment of the sale consideration. The pre-emptor should however make the demands of *Shuf'a* immediately as in other cases, the execution of the claim may be delayed till the

to fancy price being paid to prevent the pre-emption. *B. E. O'Conor v. Ghulam Haider*, 3 A.L.J.R., 365; 28 All., 617.

The price is usually paid to the vendee by the pre-emptor. In *Wazir Khan*, 16 All., 126 (1893), the question was whether the money could be paid to discharge a mortgage debt.

According to *Imam Shaf'i* the price is to be paid within three days after the decree of the Kazi and according to *Imam Malik* and *Imam Ahmad* within two days after the decree and under the *Hanafi* Law the period is fixed by the Kazi.

⁵⁴ *Abbasi*, p. 109; *Agarwala*, p. 107; *Tyabji*, pp. 720-721. *Tajammul Husain v. Uda*, 3 All., 668, I. A. W. N., 44.

⁵⁵ *Baillie*, Part II, p. 183; *Querry*, II, p. 279, Sec. 53.

⁵⁶ *S. D. A. N. W.* (1860), 538.

⁵⁷ *Baillie*, Part I, p. 497; *Tyabji*, p. 723 and p. 680.

expiration of the period. The *Shi'a* and the *Shafi'i* jurists hold that the pre-emptor can claim the benefit of the condition of sale on credit.⁵⁸

17. If the pre-emptor was misinformed about the sale consideration, or of the purchase, or of the property actually sold, and he thereupon relinquished his right and later on he became aware of the true facts then his right of pre-emption is not invalidated by his previous submission or surrender.

18. The pre-emptor must pre-empt the whole of the property sold. Partial pre-emption is not allowed.⁵⁹

19. There are some well-known exceptions to the rule against partial pre-emption.

(i) If several persons have purchased a certain property from one man then the pre-emptor may take the share of any one of them.⁶⁰ If however one man has

⁵⁸ Baillie, Part II, p. 177; Querry, II, p. 272, Secs. 12 and 13.

Mr. Yusuf Ali, editor of Wilson's Digest (p. 387), adopts the view of the *Shafi'i* jurists, but in previous editions Sir Roland Wilson affirmed the view of the *Hanafi* jurists.

⁵⁹ Baillie, Part I, pp. 498-499; Wilson, p. 393; Tyabji, pp. 699—702; Abbasi, p. 107; Agarwala, pp. 118—134.

The Code of Civil Ottoman, Art. 104, also adopts this view.

Pre-emption of a part was not allowed in S. D. A. W. P., 156, N. W. S. D. A., Dec., Vol. VI, 132; S. D. N. W. (1863), 394; Cazee Ali *v.* Museeut Ullah, 2 W. R., 285; Gufoor *v.* Nur Banu, 10 W. R., 111; Durga Prasad *v.* Munsi, 6 All., 423 (1884); Izzat Ullah *v.* Bhikari Molla (1870); 6 Beng. L. R., 386; 14 W.R., 469, Raghunandan Singh *v.* Majbuth Singh (1863), 10 W. R., 379; 6 Beng. L. R., 387.

In L. A. Puech *v.* Aziz Fatima, 19 A. L. J. R., 107.—A plot of land was sold together with a house; the pre-emptor sued to pre-empt only so much of the land as was not covered by the house. The suit failed on the ground of partial pre-emption.

⁶⁰ A, B and C have purchased the property from D. E is the pre-emptor to the property sold. E if he prefers may pre-empt the share of B only.

Where several persons purchased some property, the pre-emptor is entitled to pre-empt the whole property or share of one of such purchasers by making the demand to him alone. It has

purchased a certain property from several persons then the pre-emptor is not entitled to pre-empt under the *Hanafi* Law, any particular share of the vendors but he can do so under the *Shafi'i* Law.

(ii) If several owners of different properties combine and sell their properties by one sale-deed for a single sale consideration to one man, then a pre-emptor of one of such properties may pre-empt that particular property only.⁶¹ If he happens to be a common pre-emptor of all different properties sold, then it is submitted that he should pre-empt all, that is, he cannot pre-empt any property which he may prefer.

(iii) If a person by one sale-deed for one sale consideration sells two distinct properties situated in two different cities then if there is a common pre-emptor to both these properties he must pre-empt both of them, that is, he cannot pre-empt one of the properties only. But if

been recently held by the Allahabad High Court that "Where the first demand was made to all the vendees but the second demand was made only to one of them then the pre-emptor was entitled to claim pre-emption against that vendee only." Muhammad Askari v. Rahmat Ullah, 25 A.L.J.R., 473 (1927), and *vide* also Aliman v. Ali Husain (1923), 45 All., 449. The best, and the easiest course for the pre-emptor would be to make the demand at the site, which would apply to all vendees. However *vide* Gunpat Jha v. Anund Singh [Decisions of the Sudder Dewanny Adalat (1848), Bengal, p. 22] where the making of the second demand in the presence of one of several sellers was held to be valid, and *vide* Brij Beharee Singh v. Durbari Lal [Decisions of the Sudder Dewanny Adalat (1850), Bengal, p. 585] where it was held that it was not necessary for the pre-emptors to prove that they had preferred their claim to one or other of the joint purchasers or sellers. It is difficult to find a clear text on this point from the original authorities; however in my opinion the intention of the pre-emptor should be the determining factor, and the rule that the singular includes the plural may be applied but not as a general rule.

⁶¹ X. Y. Z., owners of different properties have sold by one sale-deed their properties to M. And N is the pre-emptor of the property sold by Y, hence N may lawfully pre-empt that property.

these properties were sold by two sale-deeds then he could pre-empt either of them. However if there is a pre-emptor to one of such properties only then the better opinion is that he could pre-empt that property.⁶²

If a person by one sale-deed has sold two or more properties in the same city then if the pre-emptor happens to be a *khalit* in the right of way, he cannot pre-empt one of them only, but if he happens to be a *jar* to one of such properties then he is entitled to pre-empt that particular property only.

Similarly if a certain property was exchanged for another property then the pre-emptor of each of them could pre-empt that particular property, and if there is a common pre-emptor he must pre-empt both the properties comprised in one transaction.⁶³

⁶² In Mohammad Wilayat v. Abdul Rab (1889), 11 All., 108, followed in Mujib Ullah v. Umid Bibi (1899), 21 All., 119, a very interesting point was discussed. By one sale-deed two distinct properties one in a village and the other in the city of Moradabad, were sold and for which one price was paid. The property situated in the city was pre-empted under the Muslim Law and the village property under the *wajib-ul-'arz*. The Court held: In the view we take the plaintiff was disqualified from claiming the property in Moradabad, and we think that disqualification would prevent him from maintaining his suit for any portion of this property which was included in one common sale." This decision can be supported from the original authorities. The *Majma'-ul-Bahrain* however says that according to Imam Zafr the pre-emptor could pre-empt one of the properties sold. However, if the properties were sold under one sale-deed, but the price of each property was separately specified, then it may be argued that the transaction amounted to a distinct sale of each of the properties, hence a common pre-emptor may pre-empt one such property. This appears to be the opinion of the Allahabad High Court in Lachman v. Tulshi Ram, 2 A.L.J.R., 199.

⁶³ The property A is exchanged for the property B. Then on paying the value of the property B the pre-emptor of A may pre-empt the property A and the pre-emptor of B may pre-empt the property B on payment of the ascertained value of the property A. But if there was a common pre-emptor then it is sub-

(iv) If the pre-emptor discovers that his own property has been wrongfully included in the sale then he may lawfully claim his own property as owner and the remaining portion by way of pre-emption.⁶⁴

If the pre-emptor discovers that the title of the vendor is defective as to a portion of the property then he may claim pre-emption as to the rest of the property only ; but he shall conclusively establish that the vendor had no title to that portion before the suit is decreed.⁶⁵

(v) If a certain property belongs to four partners, and the vendee during the absence of one of the partners purchases three shares one after another from three partners, and thereafter the fourth partner appears, then he is entitled to pre-empt the first sale, but as regards the second and the third transactions he and the vendee both would be considered as equal pre-emptors.

mitted on the analogy of the case of sale of two properties by one sale-deed that both the properties must be pre-empted if at all. The actual case of exchange is not (within my knowledge) covered by any original text, but the case of the sale is based on the texts.

⁶⁴ In Bhagwati Saran v. Parmeshar Das, 36 All., 476, it was held that there was no defect in the frame of the suit if the plaintiff claimed the property as full owner and in the alternative for pre-emption. And in Abdul Aziz v. Maryam Bibi, 25 A.L.J.R., 48 (927), it was held that "the causes of action for claiming possession of his own property and for claiming pre-emption of the vendor's property are separate and distinct and there is no ground for not allowing the plaintiff to combine the two in one and the same suit. However it is not permitted for the pre-emptor to completely deny the title of the vendor, because the vendee took the property with all the risks and the pre-emptor must offer to be substituted completely in his place." Sahodra Bibi v. Bageshri Singh, 37 All., 529; 13 A.L.J.R., 711, and Iqbal Haider v. Musammat Wasi Fatima Bibi, 45 All., 53. The important condition under the Muslim Law is that the pre-emptor should conclusively establish that the vendor had no title to the rest of the property in order to succeed, in pre-empting a portion of the property only.

⁶⁵ Badri Prasad v. Khuwaja Muhammad Husain, 11 A.W.N., 44.

(vi) It appears that under Anglo-Muhammadan Law, if the vendee happens to be a pre-emptor of equal degree then the other pre-emptors may lawfully pre-empt to have the property divided equally between all of them.⁶⁶

20. When two or more persons are entitled to the right of *Shuf'a* in a property then each of them must pre-empt the whole property. The claim must be in its entirety, though the decree will be given in equal shares amongst all pre-emptors.⁶⁷

21. When there are a number of pre-emptors, and some of them are absent, the property will be adjudged to all those present, but later on if the absentee appear and demand pre-emption they would be entitled to receive shares equal to the others, and if they belong to the superior grade then they would be entitled to claim the whole property.⁶⁸

⁶⁶ In Abdullah *v.* Amanat Ullah, 19 A.W.N., 82. 21 All., 292 (1899). A property was sold to a vendee who happened to be a pre-emptor also, and five persons having equal right of pre-emption sued for $\frac{5}{8}$ th of the property. It was contended that the suit should have been for the whole of the property. The Court overruled this contention. It appears to me to be a very doubtful decision, and it conflicts with the *Hanafi* Law, *vide* Sec. 20.

⁶⁷ Amir Hasan *v.* Rahim Baksh (1897), 19 All., 466, is an important case citing original authorities. In Sabq Ram *v.* Kali Shankar, 27 All., 465—A co-sharer had demanded pre-emption, and while the suit was pending another co-sharer having equal rights filed a similar suit for pre-emption of the same sale. Held that the second plaintiff was entitled to one-half of the property sold.

⁶⁸ Sircar, T.L.L. (1873), p. 519; Tyabji, p. 714.

In Raj Narain Rai *v.* Duniya Pande, 7 A.L.J.R., 259; 32 All., 340, some pre-emptors had obtained decrees and later on within limitation the pre-emptor of superior right brought a suit. Held that the suit was maintainable.

However after the period of limitation the superior pre-emptor would have no subsisting right to demand pre-emption. Where an inferior pre-emptor brought the suit on the last date of limitation and the property was *pendente lite* transferred to pre-emptors of superior class such a transfer cannot affect the right of the plaintiff to pre-empt the property, the superior pre-

22. A pre-emptor of equal degree cannot assign his share to one of the other pre-emptors. If he has assigned his right before the decree of the Court the property will nevertheless be equally divided amongst the pre-emptors who have preferred their claim.

23. If a pre-emptor has waived his right to pre-empt, then the other pre-emptors have a right to pre-empt the whole. But if the right has been perfected by the delivery of the property to a pre-emptor or by the decree of the Court then he has a separate and definite interest, and he may lawfully surrender it at will.

24. The pre-emptor has the option of inspection always, even after he has obtained a decree from the Court. And if he discovers a pre-existing defect he may avoid the sale.

25. The right of pre-emption cannot be established⁶⁹ :—

(i) if the pre-emptor has omitted to demand pre-emption or enforce his right ;

(ii) if he, of his own accord, has surrendered his right of pre-emption.

(iii) if he has acquiesced in the sale of the property.

emptors having their right barred by limitation and had lost their right on the date of the transfer. *Asa Singh v. Naubat*, 19 A.L.J.R., 143.

⁶⁹ Baillie, Part I, pp. 505—508; Sircar, T.L.L. (1873), p. 533; Ameer Ali, Vol. I, p. 733; Dayal, p. 395; Abbasi, p. 107; Tyabji, pp. 690—697.

The surrender of the right of pre-emption before the sale does not prevent pre-emption. *Abadi Begam v. Inam Begum*, 1 All., 521; *Karim Baksh v. Khuda Baksh*, 16 All., 247. The surrender of the right of *Shuf'a* may be conditional, e.g., if the pre-emptor says I have surrendered my right provided you have purchased this property, so that if another has purchased the property in question the right is not extinguished. And likewise surrender due to mistake is invalid. Surrender and acquiescence are liable to be confused. The difference is that surrender is a legal plea,

The right of *Shuf'a* once relinquished cannot subsequently be resumed.

It is submitted that in certain circumstances refusal to purchase the property contemporaneously with, that is, at the time of the actual sale transaction,⁷⁰ extinguishes the

while acquiescence acts as an equitable estoppel (*vide Thamansingh v. Jamaluddin*, 7 All., 442). In *Muhammad Nasiruddin v. Abdul Hasan*, 16 All., 300, followed in *Muhammad Yunas Khan v. Muhammad Yusuf*, 19 All., 334, a pre-emptor asserted his right of pre-emption, and offered to take the property from the vendor with a view to avoid litigation. He cannot be said to have acquiesced in the sale and thereby waived his right. In *Rupnarain v. Awadh Prasad*, 7 All., 478—held that the right of pre-emption which arose upon the sale was a new right,.....the alleged acquiescence of the plaintiff pre-emptor occurred at a time when the right claimed by him was not yet in existence. Acquiescence in a mortgage by conditional sale does not mean acquiescence in the sale becoming absolute. This was a case under the *wajib-ul-'arz* giving a right of pre-mortgage but it is obvious that under Anglo-Muhammadan Law the right of pre-emption does not arise till the sale had become absolute.

The surrender of the right of pre-emption in favour of one person does not operate in favour of another.

The mere fact of attestation of the sale-deed by the father of the pre-emptor or by the pre-emptor does not imply concurrence in the sale. 1 Oudh Cases, 252; *Hari Kishen Bhagal v. Kashi Prasad Singh* (1914), 42 Cal., 876 (P.C.); *Banga Chandra v. Gagat Kishore* (1916), 44 Cal., 186 (P.C.). But under the Punjab Pre-emption Act attestation with full knowledge operates as equitable estoppel. P.R. (1903), No. 15.

⁷⁰ It may be argued that if the pre-emptor and the vendee make simultaneous offers for the same, and if the pre-emptor was aware of this fact and allowed the vendee to take the house at a higher price then his conduct would amount to equitable estoppel on the ground of acquiescence. If the pre-emptor preferred not to exercise his claim on one occasion of the sale of a certain property, he is not thereby precluded from pre-empting the same property on the subsequent sale of that property.

In *Munawar Husain v. Khadim Ali*, 5 A.L.J.R., p. 331, it was held, in order to debar the pre-emptive right an opportunity to purchase must be given to the pre-emptor when a definite agreement to purchase at a fixed price has been entered between the vendor and the vendee.

In *Ghulam Mohiuddin Khan v. Hardeo Sahai*, 18 A.L.J.R., 413; 42 All., 402; an insolvent's property was sold by public auction by the official assignee. The auction was notified and was within the knowledge of the pre-emptor, but he did not bid at the

right of pre-emption. Mere refusal to purchase before the sale does not destroy the right of pre-emption for the right of pre-emption arises after the sale.⁷¹

Similarly the right of pre-emption is destroyed if the pre-emptor takes from the vendee the same property, the subject-matter of pre-emption, on rent, or negotiates with the vendee for the purchase of the property to himself, or for its lease.

It is not necessary for the vendor to give notice to the pre-emptor, and offer to sell the property to him.⁷²

sale; this was construed to be a refusal to purchase. This was a case under the *wajib-ul-'arz*, strictly speaking under the Muslim Law, it was incumbent on the official assignee to offer the property to the pre-emptor at the highest price bid at the auction.

⁷¹ The mere fact that the pre-emptor refused to purchase before the price was settled does not debar his right of pre-emption (*vide* Kanhai Lal v. Kalka Prasad, 2 A.L.J.R., 390; 27 All., 670). Here the property was sold by a receiver. Subhagi v. Muhammad Ishaq, 6 All., 463; Kuldeep v. Ram Deen, 24 W.R., 198; Braj Kishore v. Kirti Chandra, 15 W.R., 247, and Toral v. Auchhi, 18 W.R., 10. And if the refusal was due to dispute about the price or *bona fide* belief that the price demanded was fictitious then the right remains subsisting if the sale actually takes place.

In Ahmad Ali v. Najmaunnisa, 2 A.L.J.R., 115, it was held that a mere fact that a pre-emptor accepts from the vendee mortgage-money due upon the property which is the subject of pre-emption does not amount in law to a waiver of his pre-emptive right.

According to the *Fatava-i-Kazi Khan* and the *Durrul-Mukhtar* the pre-emptor may make an agreement with the vendee to purchase the property after some time. But in Habib-un-nisa v. Barkat Ali, 8 All., 275; 6 A. W. N., 114, Mahmood, J. remarked that "when the pre-emptor enters into a compromise with the vendee or allows himself to take any benefit of him in respect of the property which is the subject of pre-emption, he, by so doing, is taken to have acquiesced in the sale and to have relinquished his pre-emptive right." In this case the vendee had entered into an agreement with the pre-emptors that they would sell the property to the pre-emptors within a year, if the latter paid the price and purchased it for themselves.

⁷² "It seems that according to the Maliki School the vendor is entitled to issue a notice to the pre-emptor through the Court, the purchaser can ask the pre-emptor whether he exercises his right or not. It is a moral duty of the vendor as well as of the

26. (i) If the pre-emptor together with a stranger has purchased a certain property then his right of pre-emption becomes void with respect to the purchased property.⁷³

(ii) If the pre-emptor has associated with himself a stranger as co-plaintiff who has in fact no claim to pre-emption, then his right of pre-emption becomes void.⁷⁴ He has omitted a part of his claim, and so the whole of his right is extinguished.

purchaser to inform the pre-emptor the fact, about the sale, giving rise to the right, and this is what all God-fearing men will do but there is no legal obligation for doing this. In a case in which the purchaser summons the pre-emptor before the Law Court to exercise his right or to renounce it, the latter would be required to declare his intention immediately." Andre Marneur's *La Chefa* (p. 106), *vide* D. W. Kathalay, *The Law of Pre-emption*, p. 154.

⁷³ This was the view also held by the Sardar Diwany Adalat of the North-Western Provinces in *Sheo Dyal v. Bhairo Ram* (1860), 15 N.W.P., S.D.A.R., 53, where it was held that a co-sharer purchasing property jointly with a stranger forfeited his pre-emptive right and rendered the entire sale liable to pre-emption by other co-shareholders (*vide* also *Guneshee Lal v. Zaryat Ali* (1870), N.W.P., H.C.R., 343; *Bhawani Prasad v. Damru* (1882), 4 All., 197; *Mamma Singh v. Ramadhin Singh* (1881), 4 All., 252 and in *Sabgram Singh v. Raghubar Dayal* (1887), 15 Cal., 224. However, in *Hajras v. Kanhya*, 7 All., 118, it was held that it is not obligatory upon him to impeach the sale so far as the co-sharer-vendee is concerned for it may well be that he has no desire to exclude such co-sharer (*vide* also *Sheobharos Rai v. Jiachi Rai* (1886), 8 All., 462 and in *Ram Nath v. Badri Narain* (1896), 19 All., 148 (F.B.) and in *Mushtaq Ahmad v. Amjad Ali*, 19 All., 311, the Court held that where the share sold to the stranger was stated in the sale-deed then that share is alone to be pre-empted on proportionate payment of the price, but where the sale-deed does not specify the share purchased by the stranger, then the co-sharer-vendee is to be treated in the same position as the stranger and the claim is to be decreed against him also. However under section 45 of the Transfer of Property Act co-vendees are presumed to be equally interested in the property sold, and hence it may be argued that the claim of the pre-emptor should be decreed to that extent only and not against the co-sharer-vendee.

⁷⁴ Wilson, p. 388; Tyabji, pp. 667 and 692.

This rule is based on the principle of equitable acquis-
cence, that is, a person (co-sharer-vendee) cannot claim the

However if the person joined as co-plaintiff is not a stranger and is one entitled to pre-empt the property and belongs to the same category then the suit is perfectly lawful.⁷⁵

After the pre-emptor has obtained the decree⁷⁶ then the pre-emptor may sell the property to a third person who may deposit the purchase-money in Court. But such a transaction may give rise to a fresh cause of action to other pre-emptors.

pre-emptive right which he has himself violated, by associating himself with a stranger. *Bhawani Prasad v. Damru*, 5 All., 197; 2 A.W.N., 217; *Rahima v. Razzaq Ali*, 21 A.L.J.R., 184. In *Ali Ahmad v. Rahmat Ullah*, 14 All., 195, 12 A.W.N., 42, the pre-emptor had joined the mortgagee as co-plaintiffs in the suit for pre-emption the suit was dismissed *in toto* (*vide also Rajoo v. Lalman*, 5 All., 180). Is it possible for the pre-emptor to strike out the name of the stranger associated with him in filing the suit? It is submitted that his error could be rectified in the Court of the first instance, but not afterwards in the Appellate Court. Under O. 6, R. 17 of the Civil Procedure Code the Court has power to amend any pleading. The Allahabad High Court has however maintained the view that amendment of the plaint cannot be allowed. *Bhupal Singh v. Mohan Singh*, 19 All., 324; 17 A.W.N., 72. But *vide Karan Singh v. Muhammad Hussain*, 7 All., 860, which favours the correct view. The Punjab Chief Court allowed the names of strangers to be struck out. P.R., No. 83 (1898); P.R., No. 29 (1894); and also No. 102, P.R., No. 94 (1895); and P.R., No. 19 (1898).

The Punjab Chief Court has also held that if the pre-emptor has merely entered into agreement with a stranger as to what he will do with the property after decree simply in order to raise funds to meet the litigation expenses then he does not forfeit his claim to pre-emption. P.R. (1898), No. 19, P.R. (1896), No. 87, P.R. (1902), No. 10.

⁷⁵ *Chotu v. Husain Baksh*, 13 A.W.N., 25.

If two persons equally entitled to pre-empt file a suit and one of them withdraws then the other may lawfully pre-empt the whole property. *Uday Ram v. Maula*, 5 A.W.N., 189.

Where the vendee is a total stranger then the right against him is not lost owing to the fact that the pre-emptor has joined with him persons, who have different rights *inter se* *Sheoraj Singh v. Naik Sahai*, 41 All., 423; 17 A.L.J.R., 391.

⁷⁶ *Ram Sahai v. Gaya*, 7 All., 107, where a pre-emptor alienated his share pending an appeal, held it cannot affect

27. The right of pre-emption does not arise in favour of a person who has a mere expectancy of inheritance, or has any kind of contingent interest or any right falling short of complete ownership, however the property by reason of which the right accrues may not be in the possession of the pre-emptor nor is the right of pre-emption affected if this property was already mortgaged to a stranger.⁷⁷

28. If the pre-emptor previous to the decree of the Court sells the property by means of which he derives his right of pre-emption, then his right is thereby invalidated.⁷⁸ That is, the pre-emptor must retain the pre-emptive cause at the time of the sale, and at the time of the institution of the suit and till the decree of the Court of first instance. If the pre-emptor has sold the property reserving for himself a condition of option then since his right in the property is not absolutely extinguished the right of pre-emption remains intact, during the time the option has not become absolute.⁷⁹

his right. *Sakina Bibi v. Amiran*, 10 All., 472; 8 A.W.N., 177; *Bibi v. Akbar Ali*, 21 A.W.N., 183; where the pre-emptor sold his decreed share, to raise funds to pay the purchase money.

⁷⁷ *Gokul Chand v. Ram Prasad*, 9 A.W.N., 127; *Ujgar Lal v. Jai Lal*, 18 All., 382; 16 A.W.N., 112.

⁷⁸ *Dayal*, p. 396; *Wilson*, p. 388; *Tyabji*, p. 696; *Abbasi*, p. 108.

It is submitted that in British India the first Court is equivalent to the Kazi's Court, hence the first decree is important and therefore if subsequent to the decree the pre-emptor's right is extinguished, it does not affect the property pre-empted. The same view would apply if the pre-emptor's right is extinguished after the decree of the first Court but during the course of the appeal (*vide Umrao v. Lachman*, 22 A.L.J.R., 234). "In dealing with suits for pre-emption three dates have to be looked for, namely, the date of the sale sought to be pre-empted, the date of the suit, and the date of the first Court's decree."

⁷⁹ In *Tafazul Husain v. Than Singh*, 32 All., 567; 7 A.L.J.R., 715, after the pre-emptor had filed the suit the property was partitioned in consequence and the pre-emptor and the vendor became

If the pre-emptor has sold an undivided part of the property which gives him the right of pre-emption then also his right of pre-emption is not invalidated, and again if he sells a divided share but not the adjoining part next to the subject of pre-emption then also his right is not invalidated, but if he has sold the adjoining portion then his right is invalidated.

29. (i) If the vendee died, the property can be alienated or taken by the creditors of the vendee, but the right of pre-emption is not invalidated.

(ii) If after having sold a certain property the vendor died the right of pre-emption is not invalidated.

If the vendor was suffering from *Marz-ul-maut*, death-illness when he sold a certain property, and he had no other property, then his legal representatives according to some jurists cannot claim pre-emption with respect to the property sold, and according to others they can on paying the value of the property, but if the deceased left some other property also then there is a consensus of opinion that his legal representatives by reason of the inherited property have the right of pre-emption.⁸⁰

(iii) If the pre-emptor died before he perfected his title, by obtaining possession of the subject-matter of pre-emption, or by judicial decree, then his right under the *Hanafi* Law is thereby extinguished,⁸¹ but under the *Shafi'i* Law and the *Shi'a* Law⁸² it passes to the pre-emptor's

owners of different mahals and thereby the pre-emptive right was extinguished before the decree, the suit therefore failed.

⁸⁰ According to Imam Abu Hanifa in all cases the legal representatives have no right to pre-empt the property sold.

⁸¹ Sircar, T.L.L. (1873), p. 531; Wilson, p. 401; Abbasi, p. 108; Tyabji, p. 692; Kathalay, p. 124; Dayal, p. 396.

The Code Civil Ottoman, Art., 1038 adopts the *Hanafi* view.

⁸² Baillie, Part II, p. 190; Querry, II, p. 285; Secs. 89, 90; Wilson, p. 464.

representatives. It appears that the *Hanafi* view has not been accepted by the Bombay High Court,⁸³ and the Allahabad High Court has applied it subject to certain restrictions.⁸⁴ It is submitted that under Anglo-Muhammadan Law the right to sue survives to the executor and administrator according to Sec. 306 of the Indian Succession Act XXXIX of 1925.⁸⁵

30. (i) If the pre-emptor acts as the vendor's⁸⁶ agent and sells the property for him then he has no right of pre-emption in respect of the same property. But if he acts as the vendee's agent then he retains the right of pre-emption.⁸⁷

If the pre-emptor acts as a *zamin*, surety, guaranteeing vendor's title then he forfeits his right to pre-empt the same property. If the pre-emptor becomes surety for the payment of sale-consideration by the vendee he forfeits his right of pre-emption.

Under the *Shi'a* Law the right is inheritable among all the heirs in proportion to their shares of inheritance, e.g.,—a *Shi'a* Muslim dies after filing the suit for pre-emption and leaves a widow and son. Then if both claim pre-emption the property will be divided in the ratio of 1/8 to 7/8.

⁸³ In Sayyad Jiaul Hussain, 36 Bombay, 144 (1911), the pre-emption was claimed under the Muslim Law and the Court held that section 89 of the Probate and Administration Act, 1881, has superseded the *Hanafi* Law *vide also* Sitaram, 41 Bombay, 636 (1917), P.C.

⁸⁴ Muhammad Husain v. Niamut-un-nissa, 20 All., 88 (1897).

⁸⁵ The Indian Succession Act XXXIX of 1925 has repealed the Probate and Administration Act V of 1881.

⁸⁶ It is obvious that the vendor cannot claim pre-emption in respect of the property sold by himself.

⁸⁷ Bohra Ganga Prasad v. Pooran (1928), 26 A.L.J.R., 89; Ganga Prasad was the *Mukhtar-am* of the vendor and took part in the proceedings relating to the sale of the 1st of February, 1922, to the vendee. Subsequently he purchased a part of the property sold, from the vendee, on 7th of March, 1922. Held assuming that Ganga Prasad has disqualified himself from pre-empting the sale to the vendee, it does not follow that he has also disqualified himself from resisting a claim for pre-emption against him after he has purchased a part of the property.

(ii) If the vendor had contracted to sell subject to the option of a third person, and he confirmed the sale, then he is like the vendor and is not entitled to claim pre-emption, but if the vendee stipulated the option of a third party who confirmed the sale then his right of pre-emption on that account is not invalidated.

(iii) If the *Muzarib* partner sold a house from the partnership property and if the *Rub-ul-mal* partner is its pre-emptor then he cannot pre-empt that house. But if the *Muzarib* partner sold a house which does not belong to the partnership property then the *Rub-ul-mal* partner has the right to claim pre-emption.⁸⁸ If a *Muzarib* partner had purchased a house from the partnership's fund, and the *Rub-ul-mal* partner purchases another adjacent house for himself then the *Muzarib* partner is entitled to pre-empt that house.

(iv) If the *Mufawiz*⁸⁹ partner sells his own house then his co-partner is not entitled to pre-empt that house and if the *Mufawiz* partner surrenders the right of pre-emption then the surrender is deemed to be valid as against his co-partner.

31. If the pre-emptor possesses different rights of pre-emption, that is, supposing he is a partner and a neighbour, then the extinction of the right in the capacity of a partner does not extinguish the right of a neighbour.

32. The lawful guardian or the father of the minor or the guardian of a person of unsound mind may lawfully demand pre-emption on his behalf or he may relinquish the right. If he does not do so then the claim is barred abso-

⁸⁸ *Muzarib* means a partner who applies his personal labour and *Rub-ul-mal* means a partner who supplies his capital in the partnership.

⁸⁹ *Mufawiz* is a partner who has contributed an equal amount to the partnership fund and is held responsible for his co-partners' acts.

lutely and cannot be set up again by the minor on coming of age or by the insane person on recovering his reason.⁹⁰

According to some jurists if the lawful guardian of the minor purchases some property on behalf of the minor, and happens to be the pre-emptor of the same property also, then his right of pre-emption becomes void, but according to few jurists he can exercise the right with the permission of the Court.

Under the *Hanafi* Law, if the father purchases a certain property for his minor son and happens to be the pre-emptor of that property also then he could pre-empt it for himself, but according to *Imam Zafr*, the father forfeits his right of pre-emption.

And similarly if the father purchases a certain property for himself, and his minor son happens to be the pre-emptor of that property then his minor son on attaining majority (puberty) cannot pre-empt the said property, but if a person sells his own property then his minor son pre-emptor, on attaining majority (puberty) may lawfully pre-empt the property sold.⁹¹

If a woman gives birth to a child within six months from the date of the sale transaction, then such a child may claim pre-emption by reason of the property he inherits on birth.

33. The vendee has the right to retain the property until he receives the purchase-money from the pre-emptor, and assuming that the vendor is in posses-

⁹⁰ Abbasi, p. 108; Tyabji, pp. 310 and 687; Dayal, p. 395.

Under the *Shi'a* Law the minor on coming of age, or lunatic on recovering his reason, may demand pre-emption of the property on his own account. And he may annul a pre-emptive purchase if he considers it to be disadvantageous. Some *Hanafi* authorities support this view also. This is the view of the Code Civil Ottoman, Art. 1035 also.

⁹¹ It is difficult to think whether all this law would be applied in British India.

sion he may also retain the property until payment of the money by the pre-emptor.

34. (i) If the vendee has made improvements, altered or erected a building or planted trees on the land then the pre-emptor has the option to cause the building and trees to be removed or if the removal be found to be injurious then he may take the land with the said improvements on payment of the value of the materials⁹² only.

(ii) If the vendee has improved the property by engraving, drawing, painting then the pre-emptor must pay for the improvements or forego his claim altogether.

(iii) If the vendee has cultivated the land then the pre-emptor must wait until the crops are ready, and thereupon the vendee must remove the crops, and the pre-emptor may then pre-empt the land at its value.

(iv) If the vendee or a stranger destroys the whole or any part of the building then the pre-emptor is entitled to take the property on a proportionate part of the original sale-consideration or he may forego his claim altogether. The vendee is entitled to keep the materials for they are not appendages of the site any longer.⁹³

35. If the subject of pre-emption is completely destroyed by some supernatural calamity, *Afat Samaviyah*,

⁹² Ameer Ali, Vol. I, p. 730; Tyabji, p. 721; Abbasi, p. 105.

According to the Code Civil Ottoman, Art. 1044, the vendee is entitled for compensation in lieu of improvements. The Egyptian Act of 1900, Art. 10 draws a fine distinction between improvements effected before and after the demand of pre-emption. In the former case the vendee is entitled to compensation, in the latter case the pre-emptor may ask the vendee to remove them, but if he elects to keep the improvements, then he should pay for them. Andre Marneur's *La Chefa*, p. 139. According to the Maliki Law it is essential that improvements should be made in good faith in order to entitle the vendee to receive compensation; compare also section 51 of the Transfer of Property Act IV of 1882. (Now amended by Act XX of 1929.)

⁹³ Ameer Ali, Vol. I, p. 732; Dayal, p. 391; Abbasi, p. 106.

vis major,⁹⁴ by fire, flood and tempest, then the pre-emptor is to pre-empt the property in its present condition on payment of the original sale-consideration or forego his claim altogether. However if a part of the property was destroyed and the vendee removed the materials then a portion of the sale-consideration will accordingly be reduced.

If a building be swept away by an inundation then the pre-emptor may take the land at its original price.

36. If the pre-emptor in possession of the pre-empted property makes any improvements or erects a building, and it afterwards appear that the vendor had no title to pass to the vendee and thereby to the pre-emptor himself, then the pre-emptor is entitled to recover the price paid from the vendor, and according to the *Shafi'i* Law from the vendee as it is paid to him always, but he cannot recover the expenses incurred in making improvements or erecting the building.⁹⁵

According to the *Fatawa-i-Alamgiri* if the pre-emptor discovers a defect, but retains the property then he is entitled to recover compensation, for the loss sustained, from the vendee provided he had pre-empted the property by the order of the Court. The vendee will recover the amount from the vendor.

37. All transactions done by the vendee in possession affecting the property are voidable at the instance of the pre-emptor. The pre-emptor is to take the property as it stood at the date of sale.⁹⁶

⁹⁴ Ameer Ali, Vol. I, p. 732; Dayal, p. 390; Abbasi, p. 106.

⁹⁵ Ameer Ali, Vol. I, p. 731; Dayal, p. 390.

⁹⁶ Ameer Ali, Vol. I, p. 732; Dayal, p. 390; Abbasi, p. 106.

In *Kamta Prasad v. Mohan Bhagat*, 6 A.L.J.R., 966; 32 All., 45, a vendee having purchased the property mortgaged a portion of it to the vendor. The pre-emptor pre-empted the property and paid the sale-consideration which was taken away

The right of pre-emption is not affected by the parties dissolving the sale after it was finally completed.⁹⁷

38. The pre-emptor becomes the owner of the property when he takes possession of the subject-matter of pre-

by the vendee. In a suit for sale upon the mortgage—held that the vendee's right as a purchaser is subject to the pre-emptor's right of pre-emption and that the vendee cannot defeat the preemptive right by subsequently mortgaging the property so as to force him to take the property subject to the mortgage.

A pre-emptor made the demands of pre-emption. Subsequently the vendee transferred the property to a third person. Held that the subsequent sale must be deemed to have been effected subject to any right of pre-emption in force by the plaintiff. Muhammad Abdul Rahman *v.* Muhammad Ayyub Khan, 22 A.L.J.R., 817 (1924).

Where the vendee transferred the property to one of the two rival pre-emptors it was held that the doctrine of *lis pendens* was applicable and the other pre-emptor was entitled to pre-empt a one-half share of the property on payment of one-half of the consideration. Bhagwan Sahai *v.* Nanak Chand (1927), 25 A.L.J.R., 479. Where the purchaser acquired the status of a co-sharer *pendente lite*, held the plaintiff was not deprived of his right to pre-empt—Rohan Singh *v.* Bhan Lal, 31 All., 530. The right of pre-emption was not affected where the contract was dissolved. Bhodo Mohamed *v.* Radha Churn Bahi, 13 W.R., 332.

⁹⁷ Where after the institution of a pre-emption suit the vendee sold the property back to the vendor held that the pre-emptor was entitled to pre-empt the property. Tota Ram *v.* Gopal Singh, 16 A.L.J.R., 505, Kidar Nath *v.* Bankey Bihari, 11 I.C., 645; Imami *v.* Allah Diya, 40 I.C., 767. In Raj Narain *v.* Dunia Chand, 32 All., 340, it was suggested (p. 343) where there has been a re-sale by the original vendee the pre-emptor must claim to pre-empt both sales. However in Sheo Charan Singh *v.* Bhikai (1911), 14 O.C., 156, it has been held that a re-sale to the vendor before the institution of the suit defeats the right of the pre-emptor. But under the Muslim Law the demands having been made the right of pre-emption cannot be defeated, provided of course that the vendee had taken possession of the property under the original sale. And happily the same Court in Manna Singh *v.* Behari Singh (1916), 19 O.C., 183, overruled 15 O.C., 156, citing S.A., No. 191 of 1914 appended to the judgment. In S.A. No. 191 of 1914, pre-emption was claimed in respect not of the first but of the second sale this view is also in consonance with the Muslim Law. Manna Singh's case is an authority for the proposition that once a right of pre-emption has accrued it cannot be defeated by subsequent act of the vendee, except by the act of the pre-emptor or barred by the Law of Limitation.

emption either with the vendor's or vendee's consent or in pursuance of the decree on payment of the purchase-money. The vendee is in the meantime entitled to retain the income and fruits of the property. In case an appeal is filed by the pre-emptor then his title is perfected from the date of the decree of the highest Appellate Court.⁹⁸

39. The right of pre-emption is defeated by various devices⁹⁹ the best device is by the vendor reserving to himself a narrow strip of the land or house adjoining to that of the *Shafi'-i-jar* in question. However even by this device the right of *Shafi'-i-sharik* or *khalit* is not defeated.

40. When the Court decrees a claim to pre-emption,¹⁰⁰ it shall fix a day on or before which the pre-emptor

⁹⁸ In Deekinandan, 12 All., 234 (1889), Mahmood, J. was of opinion that the vendee was entitled to the profits accruing up to the date when the pre-emptor acquired possession of the property in accordance with the terms of the decree. This view was approved by the Privy Council in Deonandan Prasad *v.* Ramdhari Chaudhri, 44 Ind. App. 80 (1916); 15 A.L.J.R., 375. In this case under a Subordinate Judge's decree the pre-emptors were in possession from 1900 to 1904. The High Court reversed the decree and the original vendee regained possession. The pre-emptors appealed to the Privy Council and succeeded. They recovered possession in 1909. Held that the original vendee was entitled to mesne profits between 1900 and 1904 and also between 1904 and 1909.

⁹⁹ Baillie Part I, pp. 511—514; Sircar, T.L.L. (1873), p. 540; Hamilton Hedaya, Vol. III, p. 604; Hedaya (Grady), p. 563; Wilson, 404; Ameer Ali, Vol. I, p. 736; Tyabji, p. 724; Agarwala, p. 146; Dayal, p. 398.

It appears that Imam Abu Yusuf favours various devices to defeat the pre-emptive claim, but Imam Muhammad does not approve of devices to avoid the right of pre-emption; Imam Shafi'i, Imam Malik and Hanbal are of the same opinion as Imam Muhammad.

¹⁰⁰ The Civil Procedure Code of 1908, First Schedule, Order XX, Rule 14.

(1) Where the Court decrees a claim to pre-emption in respect of a particular sale of property and the purchase-money has not been paid into Court the decree shall—

(a) specify a day on or before which the purchase-money, shall be paid and,

shall pay the purchase-money, together with costs, if any, decreed against him. And the defendant shall deliver possession of the property to the pre-emptor, but that if the amount decreed is not paid, the suit shall be dismissed with costs.¹⁰¹

In case of rival claims to pre-emption, the Court shall direct equal distribution of property in favour of pre-emptors of equal degree, and if there are pre-emptors of the lower degree then the claim of inferior pre-emptors shall not take effect, until the pre-emptors of the higher degree have failed to comply with the terms of the judgment and decree.

(b) direct that on payment into Court of such purchase-money, together with costs (if any) decreed against the plaintiff, on or before the day referred to in clause (a) the defendant shall deliver possession of the property to the plaintiff whose title thereto shall be deemed to have accrued from the date of such payment but that if the purchase-money and the costs (if any) are not so paid the suit shall be dismissed with costs.

(2) Where the Court has adjudicated upon rival claims to pre-emption the decree shall direct—

(a) if and in so far as the claims decreed are equal in degree that the claim of each pre-emptor complying with the provisions of sub-rule (1) shall take effect in respect of a proportionate share of the property including any proportionate share in respect of which the claim of any pre-emptor failing to comply with the said provisions would, but for such default, have taken effect; and

(b) if and so far as the claims decreed are different in degree that the claim of the inferior pre-emptor shall not take effect unless and until the superior pre-emptor has failed to comply with the said provisions.

¹⁰¹ Money paid by the pre-emptor is considered no longer to be his money and so it cannot be attached by his creditors. Abdus Salam, 19 All., 256 (1897). In *Najib Khan v. Shiva Gopal*, 11 A.L.J.R., 668, a creditor of the pre-emptor took away a part of the money deposited in court. However in this case the fact of removal made no difference; it did not prevent the pre-emptor from taking possession of the subject-matter of pre-emption.

The pre-emption decree in virtue of the terms imposed on the pre-emptor becomes a decree in favour of the defendant when the conditions imposed are not complied with, and it becomes final if the time allowed for preferring an appeal has expired.¹⁰² The pre-emption decree is a purely personal one and cannot be transferred.¹⁰³

A pre-emption decree required the pre-emptor to deposit the amount to the credit of the vendees within 30 days. The money was paid out of Court but the vendee certified in Court about payment. Held that this was sufficient compliance with the decree. *Sukhpal Singh v. Abdur Rahman*, 19 A.L.J.R., 493 (*vide* also *Ram Lagan Pande v. Muhammad Ishaq Khan*, 18 A.L.J.R., 162; 42 All., 181).

¹⁰² *Gopal Das v. Mamman Kunwar*, 5 A.L.J.R., 136.

In *Hirdey Narain v. Alam Singh*, 16 A.L.J.R., 892; 41 All., 47, it was held that after the decree becomes final no time for payment could be extended by any Court.

¹⁰³ *Tyabji*, p. 718; *Kathalay*, p. 697.

The property pre-empted is however subject to the encumbrance to which it was subject when sold by the vendor. *Tejpal v. Girdhari Lal*, 30; All., 130 (1908).

However the pre-emptor is entitled to mortgage the property after the decree to pay the price. *Bela Bibi v. Akbar Ali* (1901), 24 All., 119. He can also sell the property permitting the vendee to pay the price into Court. *Ram Sahai v. Gaya* (1884), 7 All., 7 (*vide* also sec. 28).

Limitation for execution of the pre-emption decree—Art. 181 of the Limitation Act IX of 1908 applies. *Chhedi v. Lalu*, 24 All., 300.

14,350.

فتاویٰ عالمگیری
کتاب الشفعة

وهو مشتمل على سبعة عشر باباً
الباب الأول في تفسيرها و
شروطها وصفتها وحكمها

FATĀWĀ-I-ĀLAMGĪRĪ
KITĀB-AL-SHUFĀ, COMPRISING
XVII CHAPTERS

CHAPTER I

ON THE EXPLANATION, CONDITIONS, QUALI-
TY AND EFFECT OF SHUFĀ

۱ - اما تفسيرها
شرع فهو نملك البقة
المشتراة الثمن
الذي قام على
المشتري هكذا في
محيط السرخسي -

۲ - واما شروطها
فأنواع منها عقد
المعاوضة و هو البيع
أو ما هو بمعناه فلا
تجب الشفعة بما
ليس ببيع ولا بمعنى
البيع حتى لا تجبر
بالهبة والصدقة
والهبات والوصية
لان الاخذ بالشفعة
تملک علي الماخوذ
منه ما تملک هو
فاذ اذا انعدم معنى
المعاوضة فلو اخذ
الشيء اما ان يأخذ
بالقيمة او مجاناً

1. As regards the explanation of *Shufā*: In Law *Shufā* (pre-emption) signifies a right to take possession of a piece of land sold for the same price as has been paid by the purchaser. The is according to the *Muhit* of *Sarakhsī*.

2. The conditions: (a) There must be a contract of exchange or a sale or what is equivalent to it, otherwise no right of pre-emption arises. So that the right of pre-emption does not arise out of a gift *hiba* : charity, *Sadaqa* : inheritance, and bequest *wasīyyat*, because to pre-empt a property means acquisition of some property which was under the ownership of its previous owner, and the pre-emptor cannot acquire property in case of *hiba* without return, for even if he desires to take it by paying the price, then still he cannot do so, because its owner did not acquire the property by paying any value and likewise the

نالاسيل الـيـ الاول
لـانـ المـاخـوذـ مـنـهـ لمـ
يـتـمـلـكـ بـالـقـيـمةـ وـلاـ
الـيـ الثـانـيـ لـانـ الـجـبـرـ
عـلـيـ التـبـرـ لـيـسـ
بـمـشـرـوعـ فـامـتنـعـ
الـاـخـذـ اـصـلـاـوـانـ كـانـتـ
الـهـبـةـ بـشـرـطـ العـوـضـ
فـانـ تـقـابـضاـ وـ حـبـبـتـ
الـشـفـعـةـ وـانـ قـبـضـ
اـحـدـ هـمـادـونـ الـآـخـرـ
فـلاـ شـفـعـةـ عـنـ
اـصـحـابـنـاـ الـثـلـثـةـ وـلـوـ
وـهـبـ عـقـارـاـ مـنـ غـيـرـ
شـرـطـ العـوـضـ ثـمـ انـ
الـمـوـهـوبـ لـهـ عـوـضـةـ
مـنـ ذـالـكـ دـارـاـ فـلاـ
شـفـعـةـ فـيـ الدـارـيـنـ
لـافـيـ دـارـ الـهـبـةـ وـلـاـ فيـ
دـارـ العـوـضـ وـ تـجـبـ
الـشـفـعـةـ فـيـ الدـارـ الـتـيـ
هـيـ بـدـلـ الـصـلـحـ سـوـاءـ
كـانـ الـصـلـحـ عـنـ الدـارـ
عـنـ اـقـرـارـ اوـ اـنـكـلـارـ اوـ
سـكـوتـ وـ كـذاـ تـجـبـ
فـيـ الدـارـ الـصـالـحـ
عـنـهاـ عـنـ اـقـرـارـ وـاماـ
عـنـ اـنـكـلـارـ فـلاـ تـجـبـ
بـهـ الشـفـعـةـ وـلـكـنـ
الـشـفـيعـ يـقـومـ مـقـامـ
الـمـدـعـيـ فـيـ اـقـاـمـةـ
الـحـكـمـ فـانـ اـقـامـ
الـبـنـيـةـ اـنـ الدـارـ كـانـتـ
الـمـدـعـيـ اوـ حـلـفـ

pre-emptor cannot take it free of price, because no force can be exercised in case of voluntary gratuitous transfers, *tabarru'*. Hence it is not lawful to take the property in contracts where there is no exchange. But if the gift be one with a condition of return, *Hiba-bi-Shartil-'iwaz*, and possession has been mutually interchanged then the right of pre-emption arises. But if possession has been taken so far by one of the parties only, then according to our three Imams, no right of pre-emption arises. And if a person donates some property without any condition of return and thereafter the donee gives some other property in exchange for it to the donor, in this case there is no right of pre-emption in either property (this is *Hiba-bil-'Iwaz*). But pre-emption arises as regards a property received by way of a composition for a claim, no matter whether the composition was after acknowledgment or denial of the claim, or silence was observed with regard to its admission or denial. In the same way the right of pre-emption arises as regards property compounded for, when the composition is after an acknowledgement of the claim but no right accrues

المدعا عليه فنكل
فله الشفعة وكذلك
لا تجحب في الدار
المصالح عنها عن
سكوت لأن الحكم لا
يثبت بدون شرطة
فلا يثبت مع الشك في
وجود شرطة ولو كان
بدل الصلح منافع
فلا شفعة في الدار
المصالح عنها سواء
كان الصلح عن اقرار
او انكار ولو اصطلحوا
على ان يأخذ المدعي
الدار ويعطيه ^٥ ارا
أخرى فان كان
الصلح عن انكار
تجحب في كل واحدة
من الدارين الشفعة
بقيمة أخرى ان
كان عن اقرار لا يصح
الصلح ولا تجحب
الشفعة في الدارين
جميعا لأنهما ملك
المدعي و منها
معاوضة المال بالمال
و على هذا يخرج
ما اذا صالح عن
جنايته توجيب

when the composition takes place after denial of the claim, here the pre-emptor in establishing his claim acts in the position of the plaintiff, and if he brings witnesses to bear testimony, or if he demands an oath from the defendant who refuses to swear, then the right of pre-emption arises. Similarly in a case where a composition has taken place owing to the fact of silence with regard to the claim, no right of pre-emption arises, the *hukm* effect, of pre-emption does not take place where the cause *shart* is absent; hence a doubt in the existence of cause nullifies pre-emption. And if the property in lieu of composition is profitable, then the property compounded for is not subject to pre-emption whether the composition is after an acknowledgment or denial of the claim. But if the plaintiff and the defendant have compounded and agreed that the plaintiff would take the disputed property and that he would give another property to the defendant in exchange for it, then if this composition has taken place after the denial of the claim, then pre-emption is due on each of the properties in lieu of the price of the other. And if the com-

القصاص فيما دون النفس على دار لاتجحب ولو صالح عن جنائية توجب الارش دون القصاص على دار يجحب فيها حق الشفعة، وكذا لو اعتق عبداً على دار لا تجحب الشفعة و منها ان يكون البيع عقاراً او هو بمعناه فان كان غير ذلك فلا شفعة فيه عند عامة العلماء سواء كان العقار مما يحتمل القسمة ولا يحتملها كالحمام والرحى والبiero والنهر والعين والددر الصغار ومنها زوال ملك البائع عن البيع فإذا لم تزل فلا تجحب الشفعة كما في البيع بشرط الخيار للبائع حتى لو اسقط خياره وجبت الشفعة ولو كان الخيار للشترى و جبت الشفعة ولو كان

position was after an acknowledgment of the claim then the composition is not valid and no right of pre-emption arises in either of the two properties.

(b) There must be an exchange of property for property. The effect of this condition is that if a crime for which the punishment is *qīṣāṣ* retaliation is compounded for a property no pre-emption arises in such property, but if a composition is made by a property for a crime, punishable with fine, then such property is subject to pre-emption. Similarly if one should emancipate a slave in composition for some property, there is no right of pre-emption in such a case.

(c) The thing sold must be '*Aqār*' or what is equivalent to '*Aqār*' whether the '*Aqār*' be divisible or indivisible, as a bath, a mill, a well, a canal, or a stream and small houses, but on other things besides these no right of pre-emption arises.

(d) There must be an entire cessation of the seller's right of ownership in the subject of sale, and when it does not cease, as for instance, when an option is stipulated by the seller, there is no pre-emption, but, when the option drops, the

الخيار لهم لان تجبر الشفعة ولو شرط البائع الخيار للشفعي فلا شفعة له فان اجاز الشفعي جاز البيع ولا شفعة له وان فسح فلا شفعة له والحقيقة للشفعي في ذلك ان لا يفسح ولا يجير حتى يجير البائع او يجوز هو بمضي المدة تتكون له الشفعة و خيار العيب و الروية لا يمنع وجوب الشفعة ومنها زوال حق البائع فلا تجبر الشفعة في الشراء فاسدا ولو باعها المشتري شراء فاسدا بيعاً صحيحاً فتجبر الشفعي فهو بالخيار ان شاء اخذها بالبيع الاول وان شاء اخذها بالبيع الثاني ان اخذها بالبيع الثاني اخذ بالثنين وان اخذ بالبيع الاول اخذ

right comes into existence. However, the right of pre-emption arises when the option is reserved by the vendee, and such is not the case when it is reserved by both vendor and the vendee. If the vendor should stipulate for the option to be exercised by the pre-emptor then the latter would have no right of pre-emption whether he confirms or dissolves the sale. The proper course for him in such a case would be neither to confirm nor dissolve the sale but allow it to become absolute by lapse of the time of option, for then the right of pre-emption would accrue in his favour. The options of defect and inspection do not prevent the right of pre-emption from coming into existence.

(e) There must be a total cessation of all rights and interest of the vendor. Therefore there is no right of pre-emption if the sale is invalid *fāsid*. But if the vendee who purchased by an invalid sale subsequently sells it by a valid sale, thereafter the pre-emptor appears, then he has the choice to take the property on the first or the second sale, and if he pre-empts the property on the second sale, it would be at the price fixed, but if he takes it on the first sale it would be

بقيمة المبيع يوم
التقبض لأن المبيع
بيعاً فاسداً مضمون
بالقبض كالمحضوب و
على هذا الأصل
يخرج قول أبي
حنيفة، ^{فمَنْ اشترى} أشتري
أرضًا شراؤه فاسداً
فبنى عليها فإذا ثبتت
للشفيع حق الشفاعة
و عندئم لا ثبتت
و منها ملك الشفيع
وقت الشراء في الدار
الذي يا خذ منها
الشفاعة فلا شفاعة له
بدار يسكنها
بالإجارة والاعارة ولا
بدار بما عنها قبل
الشراء ولا بدار
جعلها مسجداً و
منها ظهور ملك
الشفيع عند الانكار
بحجة مطلقة وهو
البنية او تصديقه و
هو في الحقيقة
شرط ظهور الحق
لشرط ثبوته فإذا
انكر المشتري كون
الدار التي يشفع
به مسلوكة للشفيع

the market value of the property when its possession was taken; for the property sold by an invalid sale after taking possession is like usurpation of it. This is according to the 'Asl. According to 'Imâm Abu Hanîfa if a person buys a land under an invalid sale, thereafter builds on it, then the right of pre-emption accrues, whereas, the two disciples hold that no such right arises.

(f) At the time of the sale there must be *milk* ownership of the pre-emptor in some property by reason of which he claims the right of pre-emption, the pre-emptor has no right by reason of a mansion of which he is merely an occupier whether a tenant on hire or on '*ariat* nor will he have the right or pre-emption if he had sold this property before this transaction, nor if he has converted it into a *masjid*.

(g) The *milk* ownership of the pre-emptor must be established, at the time of the denial of his claim, by means of absolute evidence. This tantamounts to the establishment of the right. If the vendee denies the ownership of the house by reason of which the claim is founded, the pre-emptor cannot preempt until he has proved his title. This

لليس له ان يأخذ بالشفعة حتى يقيم البنية اذها داره وهذا قول ابى حنيفة و محمد² واحدى الروايتين عن ابى يوسف² ومنها ان لا تكون الدار المشفوعة ملكا للشفيع وقت البيع فان كانت لم تتعجب الشفعة ومنها عدم الرضى من الشفيع بالبيع او بحكمة صريحا او دلالة فان رضي بالبيع او بحكمة صريحا او دلالة بان وكله صاحب الدار ببيعها فيها عنها فلا شفعة له وكذلك المضارب اذا باع ازارا من مال المضاربة ورب المال شفيعها بدار اخرى لـ لا شفعة لرب الدار سواه كان في

is according to the views of 'Imâm Abu Hanîfa and Imâm Muhammâd and one of the two reports of Abu Yusuf also mentions the same view.

(h) The subject of pre-emption should not be the property of the pre-emptor, at the time of sale, if it is so there is no pre-emption at all.

(i) It is necessary that there should be no acquiescence by the pre-emptor, in the sale or its effect, either expressly or impliedly. If he acquiesces in the sale or its effect, say by his having been employed by the vendor to negotiate the sale, and he acts accordingly then he has no right of pre-emption. Similarly when a *Muzârib*¹ partner sell a house from the partnership property, and if *Rabbul-mâl*² partner is its pre-emptor by reason of his adjacent house, then he has no right of pre-emption whether there is profit in the partnership or not.

(j) 'Islâm, on the part of the pre-emptor, is not a condition for the establishment of the right of pre-emp-

¹ *Muzârib* means a partner who applies his person's labour.

² *Rabbul-mâl* means a partner who supplies his capital in the partnership.

الدار ربح اولم يكن فيها ربح
واسلام الشفيع ليس بشرط لو جوب
الشفعه فتوجب لاهل الذمة فيما بينهم
والذمي علي المسلمين وكذا الحرية والذكورة والعقل والبلوغ
والعدالة ليس بشرط فتوجب الشفعة
للماذون والمكاتب ومتყب البعض
والنسوان والصبيان والمجانين واهل
البغى الا ان الخصم فيما يحب للصبي او عليه
وليه الذي يتصرف في ماله من الاب ووصيه والجداب
الاب ووصيه والقاضي ووصي القاضي هكذا
في البداعي واما صفتها فالاخذ
بالشفعه بمنزلة شراء مبتداء فكل ما ثبت
للمشتري من غير شرط نحو الـ
بعيار الرؤبة يثبت للشفيع وملا يثبت

tion, so that *Zimmīs*, non-Muslims, are entitled to exercise the right between themselves and as against Muslims; similarly free birth manhood, wisdom, puberty or justice, are not requisites of the right of *Shuf'a* for slaves *māzūns*, *mukātibs*, half-freed women, minors, insane persons and *Ahl-baghy* dissenters all are equally entitled. In case of minors when the right accrues in their favour or against them, the suit would be filed by or against their lawful guardian who administers the estate, having been appointed by the father as his executor or by the great grandfather as his executor, or by the Kazi or his successor as administrator. This is according to the *Badāyi'*.

(k) The effect of is that acquisition by pre-emption is considered as a purchase *ab initio* so that all that is implied in favour of the vendee without stipulation, as for instance, the right of returning the property under the option in inspection, is equally established in favour of the pre-emptor, and whatever is not deemed to be in favour of the vendee without his stipulating for is likewise not established for the pre-emptor. This is according to the *Khizānat-ul-muftīn*.

للمشتري الا بالشرط
لایثبت للشفيع الا
بالشرط هكذا في
خزانة المفتين وما
حكمها فجواز طلب
الشفعة عند تتحقق
سببها وتأكدها بعد
الطلب وثبوت الملك
بالقضاء لها وبالرضا
هكذا في النهاية -

٣ - قال اصحابنا
الشفعة لا تجب في
المنقولات مقصوداً
وانما تجب تبعاً
للعقار وإنما تجب
مقصوداً في العقارات
كالدار والكرم وغيرها
من الأراضي
وت يجب في الأراضي
التي يملك رقا بها
حتى إن الأراضي
التي حارها الإمام
لبيت المال ويدفع
إلي الناس مزارعة
فصار لهم فيها
كردار كالبناء
والأشجار والكبس إذا
كسبوها بترباً
تقلوها من موضع
يملكونها فلو بيعت
هذه الأرضي
فيبيعها باطل وبيع
الكردار إن كان
معلوماً يجوز ولكن

(1) The effect of *Shuf'a* is to legalise the demand of pre-emption on the ascertainment of the cause and to confirm it after demand and to establish the right of property in virtue of the decree of the Kazi or by the consent of the vendee. This is according to the *Nihāya*.

3. The jurists hold that moveables are not fit objects of pre-emption by themselves, but they become fit objects as accessories to the '*Aqār*' ; and that such objects as mansion, vineyards, and other kinds of land are fit objects of pre-emption absolutely. The right of pre-emption arises on lands which are objects of property, so that when the Imam takes possession of lands for the *Bait-ul-mal*, or public treasury, and has given them up for *muzāra'at*, cultivation, to people who have built upon them, or have planted trees, or have filled them up with *turāb*, mud and sand, brought from their own lands, and afterwards sold the buildings or trees; the sale of the lands being unlawful, and the sale of the buildings being permissible, therefore there is no right of pre-emption in the buildings and trees. And similarly

لأشفعة فيها وكذا
الاراضي البيانديهية
اذا كانت الاكرة
يزرعونها فبيعها
لا يجوز في ادب
القاضي للخصف
في باب الشفعة
وانما تجحب بحق
الملك حتى لوبيعت
دار بحسب دار الوقف
فلا شفعة للواقف ولا
يأخذها المتدولي وفي
فتاوي الفقيه ابي
المليث او كذلك اذا
كانت هذه الدار وقفًا
على رجل لا يكون
للموقوف عليه الشفعة
بسبب هذه الدار كذا
في المحيط - رجل له
دار في ارض وقف فلا
شفعة له ولو باع هو
عمارة فلا شفعة
لتجارة ايضا كذا
في السراجية و
في التجريد مالا
يجوز بيعه من
العقا، كالا وقف
لا شفعة في شيء
من ذلك عند من
يرى جواز البيع
في الوقف كذا في
الخلاصة، ولو اشتري
دار أو لم يقضها حتى
بيعت بحسبها دار

the sale of lands *miyān-dīhiyat* which are ploughed and cultivated by farmers is not lawful. And it is according to chapters of '*Adab-ul-qāzī*' of Imām Khisāf's Book of pre-emption that right of pre-emption accrues by reason of milk ownership only; hence if a mansion was sold by the side of a *waqf* property the *wāqif* would have no right; nor could the *mutawallī* pre-empt the sale. This is according to the *Fatāwā-i-Kāfiyah* of Abu'l-Lais. And according to the *Muhīt* if a mansion was made *waqf* for the benefit of a private individual then also he has no right of pre-emption by reason of the *waqf* property. Hence if a person owns a house on the *waqf* land, the effect is that he has no right of pre-emption. And if he sells the house, then his neighbour also has no right of pre-emption. This is according to the *Sirājiyya*. According to the *Tajrīd* those '*aqār waqf*' endowments whose sale is unlawful, are not subject to pre-emption even according to those who hold their sale lawful. This is according to the *Khulāṣa*. If a person purchases a house, but has not taken possession of it meanwhile another adjacent house is sold, then he

اخرى فله الشفعة هكذا
في محيط السرخسي -
٢- ولا تجب الشفعة
في دار جعلت مهرا
مرأة او عوض عتق
هكذا في التبيين -
ولو تزوجها بغيرها
مهر مسمى ثم باعها
داره بمهر المثل
تجب الشفعة ولو تز
وجهها على الدار
او على مهر مسمى ثم
قبضت الدار مهرا
فلا شفعة هكذا
في خزانة المفتين -
ولو تزوجها على
مهر مسمى ثم
باعها بذلك المهر
دارا تجب للشفيع
فيها الشفعة وكذلك
اذا تزوجها على غير
مهر وفرض لها
القاضي مهر اثم باعها
دارا بذلك المفروض
تجب للشفيع فيها
الشفعة هكذا في
المحيط - ولو تزوج
امرأة على دار على

has the right of pre-emption. This is according to the *Muhît* of *Sarakhsî*.

4. There is no right of pre-emption in a house assigned to a woman as her dower or in a house given in lieu for the emancipation of a slave. This is according to the *Tabyîn*. If a man marries a woman without specifying any dower, and then gives to her a mansion in exchange for her *mahrul-misl*, dower of her equals, then the mansion is liable to pre-emption. But if he were to marry her and specify a mansion as her dower, or if the mansion is taken possession of in relinquishment of her right to dower, the mansion is not liable to pre-emption.¹ This is according to the *Khizânatul-muftîn*. If a man marries a woman for a specified dower, and thereafter gives her a mansion in lieu of the dower then the right of pre-emption arises in the mansion. So also if he marries her without any specification of dower, and some dower is subsequently fixed by the Kazi, and a mansion is given to her in lieu of her dower, the right of pre-emption arises in the mansion. This is according to the *Muhît*. If a person

¹ This is the case of *Hiba-bil-iwaz* and therefore there is no pre-emption.

ان تردد المرأة عليه
القا فلا شفعة في
شيء من الدار
عند ابى حنيفة²
وعند هما تجوب
الشفعة حصه الالف
وكذلك لو خالع
المراة ن يريد الزوج
عليها الفا فعلتى
هذا الخلاف كذا
في محيط السرخسي-

٥- اذا صالح من
دم عد على
دار على ان يريد
عليه صاحب الدار
الف درهم فلا شفعة
في الدار في قول
ابي حنيفة² وعند
ابي يوسف و محمد²
ياخذ منها جزءاً
من احد عشر جزءاً
بالدرهم وكذلك
الصلح من شجاج
العد الذى فيها
القود وان صالحة
من موصلتين احد

marries a woman for a house (as her dower) on the condition that the woman would pay him 1000 *dirhams* then according to Imām Abu Ḥanifa, there is no pre-emption in any part of the house ; but according to his two disciples that much part of the house which is equivalent to 1000 *dirhams* is liable to pre-emption. Similarly in the case *Khula*, if a woman makes *Khula*' divorce with her husband on the condition that the husband takes the house and returns 1000 *dirhams* to her, there is a difference of opinion. This is according to in the *Muhit* of *Sarakhsī*.

5. If after having committed a deliberate murder, the murderer compounds it for a house on the condition that the representatives of the murdered person should return to him 1000 *dirhams* then according to Imām Abu Ḥanifa no right of pre-emption arises in such a house ; but according to his two disciples pre-emption is due in one-eleventh part of the house fow payment of 1000. Similarly in the case of the composition of wound “*Shajāj-ul-‘Amad*” which is subject to *qisās*, there is the same difference of opinion. But if the composition is made on a house in lieu of

امراة بغير مهر و فرض
 لها داره مهرا او قال
 صالحتك على ان
 اجعلها لك مهرا
 او قال اعطيتك هذه
 الدار مهرا فلا شفعة
 للشفيع في هذه
 الفضول كذا في
 الظهيرة - رجل تزوج
 امراة ولم يسم لها
 مهرا ثم رفع اليها
 دار فهذا على
 وجهين ان قال الزوج
 جعلتها مهرك فلا
 شفعة فيها وان قال
 جعلتها بمهرك ففيها
 الشفعة كذا في
 الدخيرة -

٧ - واذا زوج الرجل
ابنته وهي صغيرة
على دار قطلبها

two wounds known as *Muzihatul-'Amad* and the other *Muzihatul Khatā*,¹ then according to Imām Abu Ḥanifa, there is no pre-emption, but the two disciples are of opinion that the pre-emptor can take half of 500 *dirhams* because the fine for *Muzihatul Khatā* is 500 *dirhams*. This is according to the *Mabsūt*.

6. A man marries a woman without mentioning any dower, and then gives her a mansion. If in so doing, he says, 'I have given it as your dower, or have assigned the mansion to you as your dower, there is no pre-emption. This is according to the *Zakhira*. A man marries a woman without specifying any dower, and then gives her a mansion. This case has two aspects:—(a) If he, in so doing, says 'I give it to you as your dower,' there is no pre-emption, (b) but if he says 'I give it to you in exchange of your dower,' the mansion is liable to pre-emption. This is according to the *Zakhira*.

7. If a person marries his infant daughter for a house as her dower and the pre-emptor demands it in pre-emp-

¹ A grievous wound inflicted on the head for which punishment is retaliation *qisās*.

الشفيع في الشفعة
فسلمها الاب له بثمن
مسمى معلوم بمهر
مثلها او بقيمة الدار
فهذا بيع وللشفيع
فيها الشفعة وكذلك
لو كانت الا بنت كبيرة
فسلمت فهو بيع
و للشفيع فيها
الشفعة و ان صالح
من كفالة بنفسه
رجل على دار فلا
شفعة فيها سواء
كانت الكفالة بنفسه
رجل في قصاص
واحد او مال ففي
حكم الشفعة وبطلاف
الصلح في الكل
سواء ولو صالح
من المال الذي
يطلب به فان قال
على ان يبرأ فلان
من المال كلة فهو
جائز وللشفيع فيها
الشفعة لأن صلح
الاجنبي عن الدين
على ملكه صحيح
كصلاح المديون
وان قال اقبضتها
عنه فالصلح باطل
هكذا في المبسوط -
٨ - ومن لا يحو
زهية بغير عرض
كالاب في مال ابنته

tion, and the father delivers it to him for some price specified as the dower of her equals, or for the value of the house, then such transaction is a sale, and another pre-emptor, if any, is entitled to demand pre-emption. And similarly if the daughter is a major and she delivered the house, then also it is a sale and the house is liable to pre-emption. If composition is made in lieu of some person acting as a surety *zāmin* for a house, then there is no pre-emption whether personal guarantee *kafālat bin-nafs* was in *qisas*, *hadd*, or *māl* property. As regards these the effect of pre-emption and the invalidation of composition are the same. If a stranger makes a composition in lieu of the creditor releasing the debtor from the whole debt, it is valid, and the pre-emptor is entitled because the composition for the debt of another person by means of his property is as valid as the composition of the debtor himself. But if the stranger says that he delivers the property to him on behalf of the debtor, then the composition is void. This is according to the *Mabsūt*.

8. Among those gifts which cannot be made without exchange, and which as such are invalid, are a gift by father

والمكاتب والعبد
التاجر اذا وهب
بعوض لا يصح ولا
تجب الشفعة عند
اني يوسف² وعند
محمد³ يصح وتجب
الشفعة كذلك في مكيط
السرخسي - وان وهب
لرجل دارا على ان
يذهب آخر الف درهم
شرطًا فلا شفعة
للشفيق فيه مالم
يتقا بضا ان قال
قد اوصيت بداري
بيعالفلان بالف
درهم ومات الموصي
فقال الموصى له
قبلت فللشفيق
الشفعة وان قال له
اووصيت له بان
يوهيب له على عوض
الف درهم فهذا
وماله باشر الهبة
بنفسه سواء في
الحكم وان وهب
نصيبا من دار
مسمي بشرط العوض
وتقابضالم يجز و لم
تكن فيه الشفعة
عندنا وكذلك ان

of the property of his minor son, or a gift by a slave *mukātib*, or a slave *māzūn*. According to Imām Abu Yusuf these gifts are not valid and not liable to pre-emption, whereas according to Imam Muḥammad they are liable to pre-emption for the gifts are valid. This is according to the *Muhr* of *Sarakhsī*. If a mansion is gifted away to a person on the condition that the donee should make a gift of 1000 *dirhams* to the donor, then the pre-emptor has no right of pre-emption until the parties have interchanged their gifts. If a person made a *wasīyyat*, will, to the effect that his house should be sold to a particular person for 1000 *dirhams* thereafter the testator dies, and the will was acted upon, then the pre-emptor is entitled to pre-emption. If he says to the executor 'I have made a will to hand over the house as a gift in exchange for 1000 *dirhams*', then in this case, and in the above the law is the same. And if a portion of the mansion mentioned above was gifted away on the condition of exchange and the parties took possession, then such a transaction is invalid, and is not liable to pre-emption and similar is the case of the property which is divisible but which is considered as

كان الشیوع فی
للعوض فیما یقسم
وان وھب دار الرجل
علی ان ابراء من
دین له علیه ولم
یسمه وقبض کان
للشفیع فیها الشفعة
وکذلک لو وھبها
بشرط الابراء مما یمد
عی فی هذه الدار
الآخری وقبضها فمھو
مثل ذلك فی
الاستحقاق بالشفعة
هکذا فی المبسوط -

٩ - رجل اشتري
جاریة بالفصالح
من عیب بها علی
حججود منه او اقرار
بالعيوب علی دار
فللشفیع الشفعة
کذا فی الجامع
الکبیر فی باب الشفعة
فی المصالح ولوصالحة
عن عیب علی الدار
بعد القبض فالقول
للمصالح فی نقصان
العيوب کذا فی
النثار خانية - . اذا
كان الرجل علی رجل
دین بقربه او بمحاجنه
فصلحه من ذلك

indivisible. If a mansion is gifted away to a person on the condition that the donee should release the donor from his debt and the debt is not specified, then the right of pre-emption arises in the mansion. And similarly if a mansion is gifted away on the condition that the donee should release the donor from all claims which he has against the mansion and the donee takes possession, then this is similar to the above as regards pre-emption. This is according to the *Mabsūt*.

9. If a person buys a female slave for 1000 *dirhams* and then compromises for her defect, whether acknowledged or denied by the seller, on a house, then pre-emption arises in the house. This is according to the *Jāmīr-al-Kabīr*, chapter of pre-emption on composition. If the composition from defect were made after the possession had been taken then as regards the loss from defect, the statement of the person who made the composition would be accepted. This is according to the *Tātār Khāniyya*. If a person owes a debit to another person, and whether he acknowledges it or denies it, the creditor compromises for that debt in lieu of a house of the debtor, or buys it from him

على ١٥ داراً واحتى
بها منه دار او قبضها
فلا يشفع فيها الشفعة
فإن اختلف هو
والشفع في مبلغ
ذلك الدين وجنسه
 فهو بمنزلة اختلاف
المشتري والشفع
في الثمن ولا يلتفت
إلى قول الذي كان
عليه الحق كذلك
في المبسوط -

١٠ - دار بين
ثلاثة نفر متلا جاء
رجل وادعى لنفسه
فيها دعوى فصالحة
أحد شركاء الدار
على مال على أن
يكون نصيب المد
عي لهذا المصالح
 خاصة فطلب الشر
يكان الآخران
الشفعة فان كان
الصلح عن اقرار
شركاء الدار بان
اقر شركاء الدار
بما اوعاه المدعى
وصالح مع المدعى
واحد منهم على
ان يكون نصيب

in satisfaction of his debt, and intends to take possession of it, then the pre-emptor is entitled to pre-empt it. But if the pre-emptor and the creditor differ as regards the total debt or its items, then this difference is treated in the same way as regards difference of price between a purchaser and a pre-emptor and as such the statement of the creditor should not be considered as final. This is according to the *Mabsūt*.

10. A mansion is shared between three individuals. Thereafter another person appears, and claims a share in it. Then one of the sharers of the mansion compromises with him for a certain property on the condition that the share claimed would now become his property. Later on the two sharers demand pre-emption in that share. In this case, if the composition was, after the acknowledgment by all sharers, of the claim of the claimant, thereafter this sharer had made the composition with the claimant on the condition that the share claimed should become his property, then the two sharers are entitled to demand pre-emption; but if the composition was after denial by sharers of the claimant's claim, then they are not entitled to demand

المدعي له خاصة
كان لهم الشفعة في
ذلك وإن كان
الصلح عن انكار
الشركاء فلا شفعة
وإن كان المصالح
مقروءاً بحق المدعي
وانكر الشريكان
الآخران حقه فالقضائي
يسأل الشريك المصالح
البنية على ما ادعاه
المدعي وإذا اقام
البنية على ما ادعاه
المدعي قبلت بنية
لانه مشترأ ثبت
ملك بائعه فيما
اشترى حتى يثبت
شراؤه وإذا قبلت
بنية صار الثابت
بالبنية كالثابت بالقرار
الشركاء وهنا
للشريكين الآخرين
حق الشفعة فهنا
كذلك وإذا ادعى
حقاً في دار وصالحة
المدعي عليه على
سكنى دار أخرى
فلا شفعة للشفيع
في الدار التي وقع
الصلح عنها كذا
في المحيط -
ولو كان ادعى ديناً أو
وديعة أو جراحته خطأ

pre-emption. If this sharer-compromiser had acknowledged the right of the claimant and the two sharers had denied his claim, then the *Kāzī* shall call upon the sharer-compromiser to produce evidence to prove the claimant's claim, and if he does so, his evidence should be accepted, for he, in the capacity of the vendee, proves the title of his vendor in the sale to himself, and on the evidence being tendered the fact is established as effectually as it would have been if acknowledged by the sharer, and as they would have had a right of pre-emption in that case, similarly here they are equally entitled to it. When a person claims a right in the mansion, and then defendant compromises with him for a *suknā*¹ residence in another house, then the pre-emptor has no right to demand pre-emption in the mansion compounded for. This is according to the *Muhīt*. If a plaintiff makes a claim for a debt, or for some property or for an unlawful wound and the defendant compromises with him in lieu of residence of a house, or for a house to be bequeathed to

¹ Simply the right to live in the house.

فصالحة على ٥ ادار
او حائط من ٥ ادار
فللشفيغ فيه الشفعة
و اذا صالح من
سكنى ٥ ادار او صيارة
بها و خدم عبد على
بيت فلا شفعة فيه
و اذا ادعى على رجل
ملا فصالحة على
ان يضع جذوعة
علي حائط او يكون
له موضعها ابدا
او سنيين معلومة
ففي القياس هذا
جائز لأن ما وقع عليه
الصلح معلوم عينا
كان او منفعة ولكن
ترك هذا القياس
فالصلح باطل
ولاشفعة للشفيغ فيها
و كذلك لو صالح
ان يصرف مسيل مائه
إلى ٥ ادار لم يكن لحاج
الداران يأخذ
مسيل مائية بالشفعة
ولو صالح على
طريق محدود معروف
في ٥ ادار كان للجار
الملائق ان يأخذ
ذلك بالشفعة وليس
طريق فيها كمسيل
الماء لأن عين
الطريق تملك فيكون

him or for the service of a slave in lieu of a house, then the house is not liable to pre-emption. But if the plaintiff claims a property against a defendant, and then the defendant compromises with him on the condition that he (other party) would allow him to insert his beams on his walls, or appropriate a place for them for ever or for a specified number of years, then according to the doctrine of *qiyās* it is valid, for the thing over which the composition is made is definite and known. It is a servitude, a gain. But the great Imām does not approve of applying *qiyās* hence, the composition becomes invalid, and the pre-emptor is deprived of his right of pre-emption. And similarly if the composition is made on the fact that the plaintiff may turn his water-course towards the defendant's house, then the neighbour of the house is not entitled to demand the water-course in pre-emption. If the composition is made with reference to a defined and specified passage in the house, then it is open to the *jār-i-mulāṣiq* to demand pre-emption in the passage. The passage in the house is not the same as the water-course, for the passage itself

شريكًا بالطريق ولا
يكون شريكًا بوضع
الجذع في الحائط
والهراوي ومسيل
الماء كذا في
المبسوط -

١١ - وفي المتنقى
عن محمد^ص في الا
ملاعِ رجل اشتري
دار او اشترط الخيار
للشقيق ثلثا قال ان
قال الشقيق امضيت
البيع عللا ان
أخذ بالشقة فهو
على شفعة وان لم
يدرك اخذ الشقة
فلا شفعة له كذا في
التاتار خاذية ولو باع
دار على ان يضمن له
الشقيق الثمن على
المشتري والشقيق
حاضر فضمن جاز
البيع ولا شفعة له
لان البيع من جهة
الشقيق قد تم فلا
شفعة له وكذلك
لو اشتري المشتري
الدار على ان

gives rise to the right of pre-emption, and the pre-emptor is a partner in the way. This is not the case in inserting of beams in the wall, or in the water-course. This is according to the *Mabsūt*.

11. It is reported from Imām Muḥammad in the *Muntaqā* that if a person buys a mansion, and stipulates an option of three days for the pre-emptor, and the pre-emptor says "I allow the sale, with the proviso that I demand pre-emption in it," his right remains intact, but if he does not demand pre-emption, his right would be extinguished. This is according to the *Tatār Khāniyya*. If a person should sell a mansion on the condition that the pre-emptor should become a surety for the payment of the price by the vendee, and the pre-emptor is present and takes this responsibility upon himself then the sale is valid, and the pre-emptor forfeits his right of pre-emption inasmuch as the sale was completed because of him. And similarly if the vendee purchases a mansion on the condition that the pre-emptor should become surety for *zāmān dark*¹ on behalf of the vendor and the pre-emptor was

¹ It appears that this means the property will be delivered in good condition as contemplated.

يُضْمِنُ لِهِ الشَّفِيعَ
الْدُرُكَ عَنِ الْبَايْعِ
وَالشَّفِيعَ حَاضِرٌ فَضْمِنَ
جَازَ الْبَيْعُ وَلَا شَفَعَةٌ
لَهُ كَذَا فِي شَرْحِ
الْطَّحاوِيِّ وَلَوْ كَانَ
الْمُشْتَرِي بِالْخَيْارِ
أَبْدَالَمْ يَكُنْ لِلشَّفِيعِ فَإِنْ
فِيهَا شَفَعَةٌ فَإِنْ
أَبْطَلَ الْمُشْتَرِي
خَيْارَهُ وَاسْتَوْجَبَ
الْبَيْعُ قَبْلَ مَضِيِّ
الْأَيَّامِ الْثَّلَاثَةِ وَجَبَ
الشَّفَعَةُ وَكَذَلِكَ لِكُنْدَهُ
هَمَابْعَدَ مَضِيِّ الْأَيَّامِ
الْثَّلَاثَةِ كَذَا فِي
الْبَسْطَ—وَإِنْ كَانَ
الْمُشْتَرِي شَرْطَ الْخَيْارِ
لِنَفْسِهِ شَهْرًا أَوْ مَا
أَشْبَهَ ذَلِكَ فَلَا شَفَعَةٌ
لِلشَّفِيعِ عَنْدَ أَبِي
حَنِيفَةَ[ؑ] فَإِنْ أَبْطَلَ
الْمُشْتَرِي خَيْارَهُ قَبْلَ
مَضِيِّ ثَلَاثَةِ أَيَّامٍ
حَتَّى انْقَلَبَ الْبَيْعُ
صَحِيحًا وَجَبَتْ
لِلشَّفِيعَ شَفَعَةٌ
كَذَا فِي السَّبِيطِ
وَفِي الْفَتَا وَيَ
الْعَتَابِيَّةِ وَلَوْ بَاعَهُ
بِخَيْارِ ثَلَاثَةِ أَيَّامٍ
ثُمَّ زَادَهُ ثَلَاثَةُ أَخْرَى
وَقَدْ كَانَ الشَّفِيعُ
طَلَبَ الشَّفَعَةَ وَقَتَ
الْبَيْعَ أَخْذَهَا إِذَا
انْقَضَتِ الْمَدَةُ الْأُولَى

present and became a surety, then he forfeits his right of pre-emption. This is according to the *Sharh-ut-Tahāwī*. If the vendee has stipulated a perpetual option, then the pre-emptor has no right to pre-empt. But if the vendee invalidates the option, and completes the sale within three days, then the right of pre-emption arises and the pre-emptor is entitled to demand pre-emption. The two disciples are also of the same opinion. This is according to the *Mabsūt*. If the vendee stipulates an option of a month or so for himself, then according to Imām Abu Hanifa the pre-emptor is entitled to pre-emption. But if he invalidates the option within three days since the sale, then the right of pre-emption arises. This is according to the *Muhibb*. It is mentioned in the *Fatāwā-i-‘Attābiyya* that if the vendor sells some property stipulating an option of three days, and then extends the option to three days more, and the pre-emptor demands pre-emption at the time of sale, then he would be entitled to claim the property at the end of the period of the first option; and if of the two neighbours one does not assert his right, the other pre-emptor

و اذا ردها احد
المجاريين علي الاصل
اخذها المجار الآخر
كذا في التأثير خاتمية -

١٢ - و اذا اشتري
دارا بعد بعينة
او بعد وبعينة وشرط
فيه الخيار لأحد
هما من شرط الخيار
لباتئع الدار فلا
شفعة للشفيع قبل
تمام البيع سواء
شرط الخيار في
الدار وفي العبد
كذا في المحيط -
و اذا اشتري دار
العبد و اشترى
الخيار ثلثا المشتري
الدار فللشفيع فيه
الشفعة فان اخذها
من يد مشتريها
فقد وجب البيع
له فان سلم المشتري
البيع وابطل خياره
سلم العبد للبائع
فان اي ان يسلم
البيع اخذ عبد
ودفع قيمة العبد
التي اخذها من
الشفيع الى البائع

may pre-empt it. This is according to the *Tatār Khāniyya*.

12. If a mansion is purchased in exchange for a definite slave or a definite sum of money under a stipulation of option for any one of them, then if the option was reserved by the vendor, the right of pre-emption does not arise before the completion of sale, it is immaterial whether the option was with respect to the mansion or the slave. This is according to the *Muhīt*. If a mansion is exchanged in lieu of a slave, and an option of three days is given to the vendee of the mansion, then the pre-emptor is entitled to demand pre-emption. If the pre-emptor pre-empted the mansion from the vendee, the sale becomes obligatory, consequently if the vendee confirms the sale exercising his option, then the slave will be delivered to the vendor of the mansion, but if he declines to confirm the sale, he retains his slave, and will give the price of the slave which he received from the pre-emptor to the vendor. In this case, the pre-emption of the mansion would not be as the result of the exercise of the option by the vendee, nor would

وَلَا يَكُونُ أَخْذُ الشَّفِيعِ الدَّارِ بِالشَّفِيعَةِ اخْتِيَارًا مِنَ الْمُشْتَرِي وَاسْقَاطُ لِتَخْيَارِهِ فِي الْعَبْدِ بِخَلَاتِ مَا إِذَا بَاعَهَا الْمُشْتَرِي فَذَلِكَ اخْتِيَارٌ مِنْهُ وَلَوْ كَانَتِ الدَّارُ فِي يَدِ الْبَاعِيْعِ كَانَ لِلشَّفِيعِ أَنْ يَأْخُذَهَا مِنْهُ بِقِيمَةِ الْعَبْدِ وَيُسْلِمَ الْعَبْدَ لِلْمُشْتَرِي وَلَوْ كَانَتِ الدَّارُ فِي يَدِ الْمُشْتَرِي فَهُنْكَ العَبْدُ فِي يَدِ الْبَاعِيْعِ انتَقَضَ الْبَاعِيْعُ وَرَدَ الْمُشْتَرِي الدَّارَ وَلِلشَّفِيعِ أَنْ يَأْخُذَهَا بِقِيمَةِ الْعَوْضِ كَذَا فِي الْمِبْسُوطِ - وَلَوْ كَانَ التَّخْيَارُ لِبَاعِيْعِ الدَّارِ بِيَبْعِيْتِ الدَّارِ بِجَنْبِ الدَّارِ الْمُبَيَّقَةِ فَلِلْبَاعِيْعِ فِيهَا حَقُّ الشَّفِيعِ فَإِذَا أَخْذَهَا كَانَ هَذَا مِنْهُ نَقْصًا لِلْبَاعِيْعِ كَذَا فِي الْمُحْيَطِ - وَإِذَا كَانَ التَّخْيَارُ لِلْمُشْتَرِي بِيَبْعِيْتِ دَارٍ بِجَنْبِ هَذِهِ الدَّارِ كَانَ لَهُ فِيهَا الشَّفِيعَةَ فَإِذَا أَخْذَهَا بِالشَّفِيعَةِ كَانَ هَذَا مِنْهُ أَجْزَاءُ الْبَاعِيْعِ فَإِذَا جَاءَ الشَّفِيعُ وَأَخْذَ مِنْهُ

it be the result of the dropping of the option in respect of the slave, and if the vendee himself had sold the mansion then he would have been considered to have exercised the option. However, if the mansion was in the possession of the vendor, the pre-emptor is entitled to take it from him on payment of the price of the slave, and in this case the slave would be returned to the vendee. Again if the mansion was in the possession of the vendee, and meanwhile the slave died while in the possession of the vendor, then the sale is cancelled, and the vendee should return the mansion, but the pre-emptor is still entitled to take it on payment of the price of the slave. This is according to the *Mabsut*. If the option was reserved by the vendor of the mansion, and then another mansion by the side of it is sold, the vendor is entitled to pre-empt it. If he pre-empts it, then this fact would be considered as invalidating the contract of sale. This is according to the *Muhīt*. If the option was reserved by the vendee, and then another house beside this house was sold, then the vendee is entitled to demand pre-emption in the latter house, and the fact of his pre-empting the latter house would be

الدار الاولى
بالشقة لم يكن له
على الثانية سبيل
لانه انما يتمنكها
الآن فلا يصير بها
جار الدار الأخرى
من وقت العقد
الآن تكون له دار
الي جنبها والدار
الثانية سالم للمشتري
لان اخذ الشفيع
من يده لا ينفي
ملكه من الاصل
ولهذا كانت عهدة
الشفيع عليه فلا
يتبيّن به انعدام
السبب في حقه
عين اخذها بالشقة
كذا في المسجوط -
اذا اشتري دارا
ولم يكن راحها تم
بعيت دار بجنبها
فاخذها بالشقة
لم يبطل خياره في
الرواتية الصحيحة
لان الأخذ بالشقة
دلالة الرضى ومحمار
الروبة لا يبطل
بالرضام صريح فكل ذلك
بالرضا صريح فكل ذلك
في محيط السريري -

considered as the confirmation of the original sale. If thereafter the pre-emptor appears and pre-empts the first sale from him, then he has no right by reason of his taking the first house in pre-emption, to demand pre-emption in the second house purchased for he (the pre-emptor) has acquired ownership just now, and therefore was not a neighbour of the second house at the time of its sale unless he happened to be owner of another adjacent house. Consequently the second house would remain the property of the vendee and the pre-emption of the first house does not in any way affect the second. This is according to the *Mabsūt*. If a vendee purchases a house and has not inspected it, meanwhile another house adjacent to it is sold, which he pre-empted, nevertheless according to the accepted view his option of inspection is not thereby invalidated because the act of pre-emption is merely considered as an implied acquiescence, while the option of inspection is not even invalidated by express acquiescence; hence implied acquiescence cannot invalidate the option. This is according to the *Muhħiṭ* of *Sarakhsī*.

١٣ - و اذا اقتسم الشركاء العقار فلا شفعة لجهازهم بالقسمة سواء كان القسمة بقضاء القاضي او بغير قضائية كذا في النهاية -

١٤ - ولا شفعة في الشراء الفاسد سواء كان المشتري مما يملك بالقبض او لا يملك وسواء كان المشتري قبض المشتري او لم يقبض وهذا اذا وقع البيع فاسدا في الاتباد اما اذا فسد بعد العقاده صحيحها فحق الشفيع يبقى على حالة الاترئ ان النصراني اذا اشتري من نصراني دارا بكحمر ولم يتقابلها حتى اسلام او اسلام احدهما او قبض الدار ولم يقبض الكحمر فان البيع يفسد وللشفيع ان يأخذ الدار بالشفعة

13. If the sharers of some immoveable property, 'aqār have partitioned it between themselves, then their neighbour has no right of pre-emption at all and it is immaterial whether the partition was effected by the decree of the *Kāzī* or by mutual agreement. This is according to the *Nihāya*.

14. There is no pre-emption in a invalid sale, *fāsid*, whether the thing purchased is of such a nature that on taking its possession it ripens into ownership or whether the vendee has taken possession of it or not. This effect follows if the sale were invalid *ab initio* for if a valid sale subsequently becomes invalid, then the right of pre-emption arises—for instance a Christian purchases from another Christian a house in exchange of wine, and before they have interchanged possessions both of them or one of them embraces Islam; or the house has been taken possession of but the wine was not; then in this case the sale becomes invalid owing to a subsequent cause, nevertheless the pre-emptor is entitled to demand pre-emption in the house. And if in an invalid sale the vendee has taken possession of the house and thus acquired its ownership,

وان فاسد البيع المشتري اذا قبض الدار المشترأة شراءً فاسداً حتى صارت ملكاً له فيبيعت دار اخرى بجنب هذه الدار غلة الشفعة فان لم يأخذ الدار الثانية حتى استرد والبائع منه ما اشتري لم يكن للمشتري ان يأخذها بالشفعة فان كان المشتري اخذها ثم استرد البيع بحكم الغساد فالا خذ بالشفعة ماض كذلك في المحيط -

١٥ - وان اشترتها شراءً فاسداً ولم يقبضها حتى بعيت دار الى جنبها فللبائع ان يأخذ هذه الدار بالشفعة لأن الاولى في ملكه بعد فيكون جاراً بملك للدار الاخرى ثمان سلمها البائع قبل الحكم بالشفعة بطلت شفعة ولا شفعة فيها للمشتري لأن حواره حادث بعد بيع تلك الدار كذلك في الميسوط -

thereafter another adjacent house is sold beside this first house, then he is entitled to pre-empt the second house. However if before he had taken possession of the second house the vendor rescinded the contract of sale on account of it being invalid, then he (vendee) would not be entitled to pre-emption whereas if he (vendee) had taken possession of the second house before the vendor had repudiated the first sale, then he would be entitled to keep the pre-empted house. This is according to the *Muhīt*.

15. If a vendee purchases a house by an invalid sale, *fāsid*, and before he takes possession of it, another house beside it is sold, then the vendor of the house has the right to pre-empt the second house, for the first house is still in his ownership hence he is the pre-emptor to the second house sold ; but if he (the vendor) had delivered possession of the house to the vendee after the right of pre-emption had accrued, then, thereby his own right had been invalidated and the vendee also has no right of pre-emption because he actually became neighbour after the sale of the second house. This is according to the *Mabsūt*. If a person buys a house by an invalid sale *fāsid*, then there is no

ومن ابتعاد
فلا شفعة فيها اما
قبل القبض لبقاء
ملك البائع فيها
اما بعد القبض
فلا حتمال الفسخ
بنى فيها ينقطع
حق البائع في الا
ستهاد و يجب على
المشتري قيمتها و تجب
للشفعي الشفعة فيها
عند ابي حنيفة²
و عند هما لا ينقطع
حقة في الا ستهداد
فلا يجب فيها
الشفعة وللشفعي
ان يامر المشتري
بهدم البناء فان
اتخذها المشتري
مسجد اغعلي هذا
الخلاف وقيل ينقطع
حقة اجماعا كذلك في
الكافي ولو اسلم دارا
في مائة قفيز حنطة
وسلمها فللشفعي
الشفعة ولو لم
يسلمها حتى افترقا
بطل المسلم والشفعة

pre-emption in such a case whether before or after its possession. The right of pre-emption does not arise before the possession of the house is taken, because the ownership of the vendor continues in it and it does not arise after its possession, the sale still being avoidable ; but if the vendee erects a building on it then the vendor's right to rescind the sale thereby is extinguished and the vendee must pay the price of the house and according to Imām Abu Ḥanīfa the right of pre-emption arises in the house, but according to his two disciples the vendor's right to rescind the sale remains intact, and hence there is no right of pre-emption. In the former case the pre-emptor is entitled to order the vendee to demolish the building, but if the vendee has turned it into a *masjid*, then in this case there is difference of opinion. This is according to the *Kāfi*. If a person for the sale of 100 *qafiz*¹ of wheat, exchanged a house, and delivered its possession, then the pre-emptor is entitled to pre-empt it, but if possession has not been delivered and they (the parties) disagree, then the sale is invalid and hence no right of pre-emption arises. But if after the delivery of the house,

¹ *Qafiz* is a measure of weight roughly equivalent to 48 seers.

لأنه غسمح ولوتنا
قضى بعد الانفراق
والتسليم فله به الشفعة
لأنه ليس بفسخ في حق
الشفيع بل ببيع جديد

كذا في القية -

١٦ - رجل أوصى له
بدار ولم يعلم حتى
يبيعت دار بجنبها ثم
قبل الوصية فلا شفعة
لعلومات قبل أن يعلم
بالوصية ثم يبيعت
الدار بجنبها فادعى
الورثة شفعتها فلهم
ذلك لأن موته صار
بمنزلة قبوله كذا في

الفتاوى الكبرى -

١٧ - ولو أوصى بغلة
داره لرجل وبرقبتها
آخر فبيعت الدار
بجنبها فشفعتها
صاحب الرقبة
كذا في محيط
السرخسي -

١٨ - سفل لرجل
وغرفة علو لغيره باع
صاحب السفل سفله
فلصاحب العلو الشفعة
ولو باع صاحب العلو
علوه فلصاحب السفل

they attempt to break the contract then pre-emption arises in the house, for the contract is really not void as against the pre-emptor, for it amounts to a new contract of sale. This is according to the *Qunyah*.

16. A house is bequeathed to a person, but he is not aware of it; meanwhile another house adjacent to it is sold, thereafter if he (the legatee) accepts the legacy, he is not entitled to pre-empt the house; however if he died before he knew of the bequest, then his heirs would be entitled to claim pre-emption, because though dead he would be deemed to have accepted the bequest. This is according to the *Fatāwā-i-Kubrā*.

17. If the income of a house is bequeathed to one person and the house itself to another person, and meanwhile an adjacent house to it is sold, then the person to whom the house was bequeathed is entitled to pre-empt the second house sold. This is according to the *Muhit* of *Sarakhsī*.

18. The upper story of a house belongs to one person and the lower story to another person. If the owner of the lower story sells it, the owner of the upper story is entitled to pre-empt it. If the owner of the upper story sells

الشفعه فيبعد ذلك
ان كان طريق
العلو في السفل كان
حق الشفعه بسبب
الشركة في الطريق
وان كان طريق
العلو في السكة
العظمى كان حق
الشفعه بسبب الجوار
فإن لم يأخذ
صاحب العلو السفل
بالشفعه حتى انهدم
العلو فعلى قول أبي
حنيفة و أبي يوسف²
تبطل شفعه وعلى قول
محمد² لا تبطل
ولو بيع السفل
والعلو منهدم فعلى
قياس قول أبي
يوسف² لا شفعه
لصاحب العلو بناء
علي ان عنده
حق الشفعه بسبب
البناء وعنه محمد²
له حق الشفعه لأن
عنه حق الشفعه لأن
بسيل قرار البناء
لا بسبب نفس البناء

it, the owner of the lower story is entitled to pre-empt it. In this case, if the way of the upper story passes through the lower, then the right of pre-emption arises on account of partnership in the way; but if the way of the upper story opens into the thoroughfare, then the right arises by reason of neighbourhood. However if the owner of the upper story does not pre-empt the lower one till the upper story is destroyed, then according to Imām Abu Ḥanīfa and Imām Abu Yusuf, the right of pre-emption is extinguished whereas according to Imām Muḥammad the right of pre-emption is not invalidated. If the lower story is sold while the upper one is in a state of demolition, then Imām Abu Yūsuf holds applying the doctrine of *qiyas*¹ that the owner of the upper story has no right of pre-emption because according to him it arises on account of the building, but according to Imām Muḥammad, he has the right, because his right of pre-emption arises on account of the right to erect the building and not on account of the building itself, and the right of its erection continues. This

¹ A process of deduction, known as Analogy.

وحق ترار العلو باتفاق
كذا في الذخيرة -
وان كان السفل لرجل
وعلوه لآخر في بيعت
دار بجنبها فالشقة
لهمما شان انهد مت
الدار قبل اخذ
الشقة غال الشقة
لصاحب السفل عند
ابي يوسف² لقيام
ما يستحق به الشقة
وهو الارض ولا الشقة
لصاحب العلو لزوال
ما كان يستحق
بها الشقة وقال
محمد² الشقة لهما
لان حقه قائم ايضا
فإنه يبني العلو
إذا بنى صاحب
السفل سفله ولو ان
يبني السفل بنفسه
ثم يبني عليه العلو
ويمنع لصاحب السفل
عن الا تتفاع حتي
يعطيه حقه كذا

في الكافي -

is according to the *Zakhira*. If the upper story of a mansion belongs to one person and the lower one to another, and then another house adjacent to it is sold, then both of them are entitled to pre-empt it. But if the mansion by reason of which pre-emption is demanded is destroyed before the claim of pre-emption in the house sold was made, then according to Imām Abu Yūsuf, the right of pre-emption belongs to the owner of the lower story, for he maintains that the land by reason of which the right of pre-emption accrues is still in existence ; while there is no right of pre-emption in existence for the owner of the upper floor on account of the destruction of the mansion itself, by reason of which pre-emption could have been demanded ; while Imām Muḥammad holds that pre-emption appertains equally well to both of them ; for he says that the right of the owner of the upper floor subsists, that is, his right to rebuild it continues ; and moreover he has also the right to rebuild the lower story himself, and then erect the upper floor on it, and prevent the owner of the lower story from taking advantage of the lower story until the expenses are defrayed. This is according to the *Kāfi*.

١٩- جلان اشتريها
داراً واحد هما شفيعها
فلا شفعة للشفيع فيما
صار لا اجنبي
لأن شراء الا اجنبي
لا يتم الا بقبول
الشفيع البيع لنفسه
كذا في فتاوى
قاضي خان -

٢٠- رجل أجره اداره
مدة معلومة ثم
باعها قبل مضي
المدة والمستأجر
شفيعها فالبيع
موقوف في حق
المستأجر لقيام
الاجارة فان اجاز
المستأجر البيع
نفذ في حقه وكان
له الشفعة لوجود
سببها وان لم يجز
البيع لكن طلب
الشفعة بطلت الا
حارة كذا في
محيط السرخسي -

٢١- وادا اشتري
ارضاً مبددة فنبت
الزرع وحصد المنشيري
ثم حفر الشفيع
أخذ الأرض بحصتها

19. Two persons purchase a house while one of them is its pre-emptor, then the pre-emptor is not entitled to pre-empt that portion which is the property of the stranger because the purchase of the stranger did not become complete till the pre-emptor accepted the sale for himself. This is according to the *Fatāwā-i-Qāzī Khān*.

20. A person rents his house for a specified period of time and then before the period expires he sells it to another. Now if the tenant happens to be its pre-emptor, then in this case the sale is withheld on account of the existence of the tenancy as against the right of the tenant to pre-empt. Thus if he (the tenant) acquiesces in the sale, then the sale is complete as against his right of tenancy ; but the right of pre-emption arises in his favour, because the cause of pre-emption has accrued ; however, if he does not acquiesce in the sale, and demands pre-emption in the house, then also his right of tenancy is terminated. This is according to the *Muhit* of *Sarakhsī*.

21. If a person purchases a land with seeds sown in it and subsequently the crops grow which he gathers, thereafter the pre-emptor appears, then he would be entitled to take the land

فتقوم الأرض بمدورة
فيرجع بحصتها
كذا في محيط
السريري -

for a price equivalent to its value ; that is the sale consideration shall be apportioned between the value of the land with the seeds and without the seeds. This is according to the *Muḥīṭ* of *Sarakhsī*.

٢٢ - واذا اشتري
نخل لايقطنه فلا شفعة
فيه ، وكذلك اذا
اشتري به مطلقا فان
اشتراها باصولها
ومو اضعها من
الارض ففيها الشفعة
وكذلك لو اشتري زرعا
او رطبة ليجذبها لم
يكن في ذلك شفعة
وان اشتراها مع
الارض وجبت الشفعة
في الكل استحسانا
وفي القياس لا شفعة
في الزرع واذا اشتري
ارضا فيها شجر
صغر او كرب فاثمرت
او كان فيها زرع
غادرك فللشقيق ان
يأخذ جميع ذلك بالثنين
كذا في المبسوط -
اذا اشتري البناء ليقلعه
فلا شفعة للشقيق

22. If a person purchases a palm tree to cut it down, or purchases it absolutely without any condition, then there is no right of pre-emption in it ; but if he purchased it along with the ground on which it stands, then it is liable to pre-emption. Similarly if a person purchases a crop or a part of it to cut it down, there is no right of pre-emption in it. But if it is purchased together with the field on which it stands then according to the doctrine of *Istīḥsān*,¹ it is liable to pre-emption but according to the doctrine of *qiyās*, there is no right of pre-emption. And if a person purchases a land in which there are small trees which afterwards bore fruit, or in which there is a crop which afterwards ripened, the pre-emptor would be entitled to take it all for the negotiated price. This is according to the *Mabsūt*. If a person purchases a building in order to pull it down, it is not liable to pre-

¹ *Istīḥsān* is equivalent to the modern notion of " equity " and it is recognised by the Hanafi School only.

فيه فان اشتراط
باصله فللشفيع فيه
الشفعة كذا في
الذخيرة -

٢٣ - ولو اشتري
نصيب البائع من
البناء وهو النصف
من البناء فلا
شفعة في هذا
والبيع فيه فاسد
وكذلك لو كان
البناء كلة لادسان
بائع نصفه كذا
في المبسوط -

٢٤ - اذا اشتري
نخلاء ليقطعها ثم
اشتري بعد ذلك
الارض وترك النخل
فيها فلا شفعة
للشفيع في النخل
وكذلك لو اشتري
الثمرة ليجذبها والبناء
ليهدمه ثم اشتري
الارض لم تكن
للشفيع الشفعة الا
في الارض خاصة
كذا في المحيط -

٢٥ - ولو اشتري
بيتنا ورحى ماء فيه
وذهبها ومتاعها
فللشفيع الشفعة

emption; but if he purchased it together with the site on which it stands, then the right of pre-emption arises in it. This is according to the *Zakhīra*.

23. If a person purchases the share of the vendor in a building (which is half the building), there is no right of pre-emption in it, for the contract of sale is invalid *fāsid* and similarly when the whole of a building belongs to a person, and if he sells half of it, the same effect follows as it does in the above case. This is according to the *Mabsūt*.

24. If a person purchases a tree in order to cut it down, afterwards he purchases the ground on which the tree stands and now leaves the tree without cutting it down, then the pre-emptor is not entitled to pre-empt the tree itself. And similarly if a person purchases fruits to pluck them, or the building to pull it down, and thereafter purchases the ground, then the pre-emptor is not entitled to pre-empt anything except the ground itself. This is according to the *Muhājir*.

25. If a person purchases a house together with a water mill and the stream, and all its accessories, then the pre-emptor is entitled to pre-empt the house together

في البيت وفي جميع
ما كان من آلات الرحي
المركبة بيت
الرحي لأنها تابعة
بيت الرحي وعلى
هذا إذا اشتري
الحمام فللشيفع
إن يأخذ بالشيفع
الحمام مع آلا نهرها
المركبة من القدر
وغيرها ولا يأخذ
ما كان مزنا بلا
للبيت في المستلة
الأولى والحمام في
المستلة الثانية
الالحجر على
من الرحى فادع
يأخذ بالشيفع
استحسانا وإن
لم يكن مركباً كذلك
في الظاهرية -

٢٦- ولو اشتري أجمة
فيها قصب وسمك
يُؤخذ بغير صيد
أخذ إلا حمة
والقصب بالشيفع
ولم يأخذ السمك
وإذا اشتري علينا
أونهراً أو براباً يصلها
فللشيفع فيها الشيفع
وكذلك إن كانت
عين قير أو فقط
او موضع ملح أخذ
جميع ذلك بالشيفع
لو جود الا تصال
معني الان يكون
المشتري قد حمل
ذلك من موضعه
فلا يأخذ ما حمل
منه كذلك في المبسوط -

with all these for they are all accessories to the mill house ; and similarly if a person purchases a bath, the pre-emptor is entitled to pre-empt not only the bath but all its accessories, water, utensils, etc., which it contains. But the pre-emptor is not entitled to pre-empt what is distinct and separate from the bath in the latter case and from the mill house in the former case except the upper grinding stone of the mill. For this he can pre-empt according to the doctrine of *Istihsān* though it is not an actual part of the house. This is according to the *Zahiriyya*.

26. If a person purchases a forest in which there are woods and fish which can be caught without netting, then the pre-emptor is entitled to pre-empt the forest and the woods but not the fish. And if a person purchases a stream, or a rivulet or a well together with its area, then the pre-emptor is entitled to pre-empt all. And similarly he can pre-empt every one of it whether it is a stream, or a salt-mine for all these are pre-emptible. But if the vendee has removed a part of these things then the pre-emptor has no right to claim that at all. This is according to the *Mabsūt*

وغي التفرید
وللشفیع ان يأخذ
ما دخل في البناء
والکنیف وكل شيء
اما الظللة ان كان
مقتنحهما في الدار
عند هما يدخل
وعند ابی حنيفة
علي التفصیل ان
قال بكل حق هو لها
يدخل والا فلا
الثمر والشجر
والزرع لا يدخل
الا بالشرط والقياس
ان يدخل الثمر
من غير الذكر كذا
في القاتار خانية -
٢٧-اشترى كرموا له
شفیع غائب فأشهرت الا
شجار فاكلها المشتري
ثم حضر الشفیع
الغائب واحد الكرم
بالشفعة فان كانت
ا لا شجاع وقت
قبض المشتري ذات
وره ولم يبد الطمع
من الوره لا يسقط
شيئي من الثمن
وان كان قد بدا
الطمع وقت قبض
المشتري الكرم يسقط

and according to the *Tafrid* the pre-emptor is entitled to pre-empt all that is within a house together with latrines except *Zilla* (a shed). But if the shed is attached to the house, then according to two disciples it is a part of the house. Imām Abu Hanīfa explains it thus; "If it comes within all the rights of the house, it would be considered as a part of the house, and if it does not, then it will be considered as separate." Fruits, trees and crops are not included in a sale unless specifically mentioned but according to *qiyās* fruits as included without specific mention. This is according to the *Tatār Khāniya*.

27. If a person purchases a vine-yard while its pre-emptor is absent and the vines bore fruit which the vendee appropriated, thereafter the pre-emptor appears and demands the vine-yard in pre-emption. In this case, if the vines were only blooming at the time of taking possession, and the fruits were not shooting forth, no remission will be made from the price ; whereas if the fruits were in existence at the time of taking possession by the vendee, then a deduction equal to the price of the fruits would be made from the sale consideration of

بقدر ذلك ويعتبر
قيمة يوم ثقب المشتري
الكرم كذا في
الذخيرة وإن
كان المشتري
أرضاً غيرها زرع لا
قيمة له فادرك الزرع
وخصده المشتري
ثم جاء الشفيع
واخذ الأرض لا
يسقط شيء من ذلك
الثمن كذا في
محيط السرخي -

٢٨ - المكاتب اذا
باع او اشتري داراً
والمولى شفيعها فله
ان يأخذ بالشقة
سواء كان عليه
دين اولم يكن
كذا في البدائع -
لو بع المولى
دار او مكاتب شفيعها
كان له الشقة
كذا في التناقار
خانية -

the vine-yard, and that price will be apportioned for the fruits which it fetched at the time when the vine-yard was taken possession of. This is according to the *Zakhīra*. If the purchased land was cultivated but was of no value at the time of sale but afterwards the crops ripened, and the vendee gathered it, then in this case, if the pre-emptor appears and pre-empts the land, no remission will be made from the price. This is according to the *Muhīt* of *Sarukhsī*.

28. If a slave *mukātib*¹ sells or purchases a house, and his master is its pre-emptor, then he is entitled to pre-empt it; it is immaterial whether he (slave) was in debt or not. This is according to the *Badāyi*.⁴ If the master of the slave sells a house, and his slave *mukātib* is its pre-emptor, then he is entitled to pre-emption. This is according to the *Tātār Khāniyya*.

¹ *Mukātib* means a slave who could purchase his freedom from his master at a stipulated sum.

الباب الثاني

في بيان مراتب
الشفعية اذا اجتمع

٢٩ - يراعى فيها
الترتيب فيقدم
الشريك على الخليط
والخليط على الجار
فإن سلم الشريك
وحيث الشفعة
للك الخليط وإذا اجتمع
خلطيطان يقدم الاخر
ثم الاعم وإن سلم
الخليط وحيث
للاجر وهذا جواب
ظاهر الرواية
وهو تصحيف لأن
كل واحد من هذه
الأشياء ثلاثة سبب
صالح للاستحقاق
وإنه يرجح البعض
على البعض للقوة في
التأثير فإذا سلم
الشريك التحقيق
شركة بالعدم ويجعل
كأنها لم تكن فيرعا

CHAPTER II

THE CLASSES OF PRE-EMPTORS.

29. When several pre-emptors claim pre-emption, they would be thus classified. A *Sharik*¹ (or a partner in the substance of a thing) is preferred to a *Khalit*¹ (or a partner in its rights) and a *Khalit* is preferred to a *jār* (neighbour). If the *Sharik* relinquishes his right, the *Khalit* is next entitled to it and among *Khalits* the special is preferred to the general. If a *Khalit* gives up his right, then *Jār* the neighbour is entitled to pre-empt the property. This is according to the *Zahir Riwayat*, and it is correct because these three qualifications are adequate cause to establish the right of pre-emption and they are in order of preference. Thus when a *Sharik* gives up his right, his partnership shall be deemed to be no longer in existence as if there was no partnership at all and then the

¹ i. e., Shafi'-i-Sharik, Shafi'-i-Khalit, and Shafi'-i-Jār, this is the accepted terminology used by writers of Anglo-Muhammadan Law but according to the Arabic text it is incorrect, the jurists use the term *Khalit* for the first as well as second class of pre-emptors.

الترتيب في البلاقي
لما لوا جتمع المخلط
والجوار ابتداء
وبيان هذه ادار بين
رجلين في سكة غير
نافذة طريقها من هذه
السكة باع احدهما
نصيبيه فالشقة لشريكه
فإن سلم فالشقة
لأهل السكة كاهم
يستوي غيرها الملائق
وغير الملائق لا
ذهم كلهم خليط
في الطريق فان
سلموا فالشقة للجار
الملائق ولو انشئت
من هذه السكة سكة
آخر غير نافذة فنبين
دار فيها فالشقة
لأهل هذه السكة
 خاصة لأن خلطة اهل
هذه السكة احسن
من خلطة اهل
السكة العليا وان
بيعت دار السكة
العليا فالشقة لاهل
السكة العليا واهل
السكة السفلى لأن
خلطتهم في السكة
العليا سواء وقال
محمد اهل الدرب
بستحقون الشقة
بالطريق ان كان
ملكون او كان فناء
غير مملوك وان
كانت السكة نافذة

order of preference begins from the *Khalit*. To illustrate this, let us take an example of a mansion which is situated in a blind street, it belongs to two persons and one of them sells his share. Then the right of pre-emption belongs in the first place, to the other partner in the mansion, and if he relinquishes his right, it belongs to the inhabitants of the street equally without any distinction whether contiguous neighbours or not for they all are *Khalits* in the way. And if they all give up their right, then it belongs to *jār-i-mulāṣiq* a neighbour behind the mansion. If another blind street branches off from this street, and a house in it is sold then the right of pre-emption belongs to the inhabitants of this inner street ; because they are more intermixed with it and form a special class rather than the people of the other street. But if a house is sold in the latter street, then the right of pre-emption belongs to the people of the former as well as to those of the latter street for they are all equally interested in the right of way. Imam Muḥammad holds that *Ahli-darb*, persons of the locality, are entitled to pre-empt by reason of the right of private

فبيعت دار فيها
فلا شفعة الا للحجار
الملاصق وكذلك
داران بنفيها طريق
نافذ غير مملوك
فبيعت احد هما
فلا شفعة الا للحجار
الملاصق وان كان
مملوكا فهو في
حكم غير النافذ
والطريق النافذ
الذي لا يستحق
به الشفعة ما لا يملك
اهله سدة وعلى هذا
يخرج النهر اذا كان
صغرى التسقى منه اراض
معدودة او كروم
معدودة فبيعت اراض
منها او كروم ان
الشرکاء كلهم شفعاء
يسقوى الملاصق
وغير الملاصق
وان كان النهر
كبيرا فالشفعة للحجار
الملاصق واختلف
في الحد الفاصل
بين الصغير والكبير
قال ابو حنيفة
و محمد اذا كان
تجري فيه السفن
 فهو كبير وان كان
لا جري فهو صغير
هكذا في البدائع -
قال الشيخ
الامام عبد الواحد
الشيباني اراد

way. And if it were a public street, and a house were sold it in, then there would be no right of pre-emption except for the *Jār-i-Mulāṣiq*. In like manner, when there is a public road between two mansions, there is no right of pre-emption, except for the *Jār-i-Mulāṣiq*, but if this road were a private property then the same law as in the case of blind street will be applied. A thoroughfare, public road which does not give rise to the right of pre-emption is a street in which its inhabitants have no right to close it up. And similarly as regard a *nahr* canal which irrigates several lands or several vineyards—if any land from amongst these lands or vineyards is sold then all the partners are pre-emptors without any distinction between those who are contiguous or not. But if the canal was a big one, then the right of pre-emption belongs only to the *Jār-i-Mulāṣiq*. There is some difference of opinion as to the distinction between a small and a large canal—Imam Abu Hanifa and Imam Muhammad hold that when boats cannot ply through a canal it is small, and when boats can ply through it, then it is a big canal. It is so stated in the *Bādiyā*. Shaikh Imam, Abdul Wāhid-al-Shaibānī

لسفن ههنا الشمار
يات التي هي اصغر
السفن كذا في
الذخيرة ولو نوع من
هذه النهر هرها آخر فيه
ارضون او بساتين
او كروم فبيعت ارض
او يسكن شربة من
هذا النهر النازع
فأهل هذا النهر
حق بالشفعه من
النهر الكبير دلو
بيعت ارض علي
النهر الكبير كان
اهله و اهد النهر
النازع في الشفعة
سواء لاستوا بهم في
الشبب هكذا في
البدائع -

٣٠ - وان كان فناء
منفرجا عن الطريق
الاعظم او يلاق
او درب غير نافذ
فيه دور فبيعت
دار منها فاصحاب
الدور شفعاء جميعا
قال الشيخ الامام
الزايد عبد الواحد
الشيباني ^٢ هكذا
اذا كان الفناء مربعا
فاما اذا كان مدردا
فالشفعة للجبار
الملاقو كذا في
الظهيرية - بيت
في دار في سكة غير

has said that here the term *shumāriyāt*, means small boats. This is according to *Zakhīra*. If another canal branches out from this (big) canal, and irrigates several lands, gardens and vineyards, and then a land or a garden irrigated by this branch canal is sold, then the people of this same canal are entitled to the right of pre-emption rather than those of the big canal. But if a land on the big canal is sold, then its participants as well as those of the small canal are all equally entitled to pre-emption, inasmuch as they are equally interested in the right of passage. This is according to the *Badāyi*.

30. If a tract of land, *zīqāq* or a road or a blind lane, a public *darb* leads out from a main public road and one of several houses situated in it is sold, then all the owners of other houses are its pre-emptors. Imām Shaibānī holds that this happens when the tract of land is a square, but if it is round, then the right of pre-emption belongs to *Jār-i-Mulāzīq*, the contiguous neighbour. It is so stated in the *Zāhiryya*. A house is situated in an enclosure in a blind lane. The house belongs to two persons, whereas the enclosure is the property of a tribe. One

غير نافذة و البيت لاثنين والدار لقوم
فباع احد الشريكين نصيحة من البيت فالشقة او لالشريك في البيت فان سلم فللشريك الدار فان سلم فلاهل السكة الكل في ذلك على السواء فان سلموا فللبحار الملا صق وهو الذي على ظهر هذه الدار و باب دارة في سكة اخر في شرح ادب القاضي للخصف في باب الشقة فان كان لهذه الدار التي هذ البيت هو فيها جيران ملائقون فالذي هو ملائق هذا البيت المبيع والذي هو ملائق لا قصي الدار لالماء الدار في الشقة على السواء وكذا في المحيط -

٣١ - دار بين شريكين في سكة غير نافذة بائع احد الشريكين نصيحة من الدار من انسان فالشقة او لالشريك في الدار فان سلم فللشريك في الحائط المشترك الذي يكون بين الدارين

of the partners of the house sells his share. In this case in the first instance the right of pre-emption belongs to the other partner in the house, and if he has given up his right, then the right devolves on the partners of the enclosure, and if they also surrender their right, then it devolves on all people of the lane; and if they too surrender their right, it passes to the *Jār-i-Mulāqiq*, i.e., the neighbour behind the house, the door of whose house opens into another lane. It is mentioned by Khisāf's in *Adab-ul-Qāzī* in the chapter of pre-emption that if there are several *Jār-i-Mulāqiq* of the enclosure in which the house is sold, then the person entitled is the nearest contiguous neighbour of this house, and not the person who is neighbour of the enclosure at its farthest end, therefore all are not equally entitled. This is according to the *Muhīt*.

31. A house belonging to two partners is situated in a blind lane. One of the partners sells his share to a person, thus the right of pre-emption, in the first instance appertains to the other partner in the house, and if he surrenders it, then the right appertains to the person who is a partner on that wall which is a

فان سلم فلا هل السكة الكل في ذلك عي السواء فان سلموا فاللبحار الذي يكون ظهر هذه الدار الى دارة باب تلك الدار في سكة اخرى في ادب القاضي للحضاف ثم الحجار الذي هو مومخر عن الشريك في الطريق هو الذي لا يكون شريكا في الأرض التي هي تحت الحائط الذي هو مشترك بينهما اما اذا كان شريكا فيه لا يكون مومخر اهل يكون مقدما و صورة ذلك ان تكون ارض بين اثنين غير مقسمة بنها في وسطها حائطا ثم اقتسما الباقى فيكون الحائط ، ما تحت الحائط من الأرض مشتركا بينهما فكان هذا الحجار شريكا في بعض البيع اما اذا اقتسما الأرض و خطها خطها في وسطها ثم اعطى كل منها شيئا حتى بنها حائطا فكل

common wall between his house and the vendor's house ; and if he too surrenders his right, then it belongs equally to the people of the lane ; and if they too surrender it, then it belongs to the person whose house is at the back of the house sold, and the door of whose house opens in another lane. It is mentioned in Khisāf's *Adab-ul-Qāzī* that the neighbour who has an inferior right than the partner in the way is the person who is not a partner in the property or the common wall, but if he is a partner in it, then he would be preferred to all partners in the way. The example illustrating this case is as follows :— There is an undivided land between two partners, and they build a wall in the middle of it, and then they divide the property between themselves but the wall and its site remain in their joint ownership ; now such a neighbour is a partner in a part of the property. But if they divide the land between them and draw a line of separation in the middle of it, and each one contributes something towards the expenses and builds a wall, then each of them would be one another's neighbour as regards the land, and partners in the constructed wall but such

منهما حارلصاحبة
في الأرض شريك في
البنا لغير والشركة
في البنا لا توجب
الشقة و ذكر
القدوري ان الشريك
في الأرض التي تحت
الحائط يستحق
الشقة في كل
المبيع بحكم الشركة
عند محمد
واحدى الروايتين
عن أبي يوسف
فيكون مقدمًا على
الحار في أكل المبيع
كذا في الذخيرة -
وقال الكرخي
وأصح الروايات عن
أبي يوسف " إن
الشريك في الحائط
أولى بقيمة الدار من
الحار و قال عن
محمد "مسائل قبيل
على أن الشريك في
لحائط أولى فانه قال
في حائط بين
رجلين لكل واحد
منهما عليه خشبة
ولا يعلم أن الحائط
بينهما إلا بالخشبة
فبيعت احدى
الدارين قال فان
اقام الآخر البنية ان
الحائط بينهما
فهوا حق من
الحار لأنه شريك

partnership in the constructed wall does not entail any preferable right of pre-emption. Imām Kudūrī has mentioned that partners in the strip of land on which the wall is situated are entitled to pre-empt the whole property sold by reason of the effect of partnership. This view is supported by Imām Muhammad and by one of the reports of Abu Yusuf. This is according to the *Zakhīra*. Imam Kurkhi says that the most correct view of Imam Abu Yusuf's is that the partner in the wall is preferable to a *jār*, and similarly certain problems of Imām Muhammad lead to the conclusion that the partner in the wall is preferred. Imam Muhammad has also said that if there is a wall between two persons and they both have inserted their beams in the wall, and they do not expressly know that the wall is a common property of them both except that both of them have their beams in the wall, and if one of the houses is sold, then if the other partner gives proof of the wall being a common wall, then he would be preferred to a mere *Shafi'-i-jār* because he is a partner, but if he does not establish it by evidence then he cannot be preferred to the

و ان لم يقم بینة له
اجعله شریکا و قوله
احق من الجار اي
احق من الجميع
لا بالحائط وهذا
مقتضی ظاهر الاطلاق
كذا في البدایع -

٣٢ - قال محمد " و في كل موضع سلم الشريك الشفعة فانيا يثبت للجار حق الشفعة اذا كان الجار قد طلب الشفعة حين سمع البيع اما اذا لم يطلب الشفعة حتى سلم الشريك الشفعة فلا شفعة له كذا في المحيط دار كبيرة فيها مقاصير باع صاحب الدار مقصورة او قطعة معلومة او بيتا فلجار الدار الشفعة فيها كان جارا من اي نواخيمها لأن البيع من جملة الدار و لشفعيه جار الدار فكان جارا للمبيع فان سلم الشفعة ثم باع المشتري مقصورة او القطعة المبيعة لم تكن الشفعة

Shafi'-i-jār. This is according to the *Badayi'*.

32. Imām Muhammad has said that in every case where the partner has surrendered his right, it appertains to *shafi'-i-jār* provided he has demanded pre-emption as soon as he heard about the sale, but if he did not demand pre-emption until it was surrendered by the partner, then he is not entitled to enforce his right. This is according to the *Muhīt*. There is a large enclosure containing several houses and plots of land. The owner of the enclosure sells a plot of land, or a specified tract, or a house in it, then the *Shafi'-i-jār* of the enclosure would be entitled to pre-empt it, no matter, on what side of the enclosure his property is situated. Because the thing sold is a part of the enclosure, therefore the neighbour of the enclosure is the neighbour of the thing sold. However if he surrenders his right thereafter the vendee sells that plot of land, or specified tract, or the house, then the right of pre-emption does not appertain

الالجار هالان المبيع
صار مقصود او مفرو
اهمالك فخرج
من ان يكون بعض
الدار كذا في
محيط السرخسي -

(٣٣) سفل بين
رجلين ولاحدهما
عليه علو بينه
وبين آخر فباع
الذى له نصيب فى
السفل والعلو نصيبة
فلشريكه فى السفل
الشفعه فى السفل
ولشريكه فى العلو
الشفعه فى العلو ولا
شفعه لشريكه فى
السفل فى العلو
ولا شريكه فى العلو
فى السفل لأن شريكه
فى السفل جار للعلو
و شريك فى حقوق
العلوان كان طريق
العلوانية و شريكه
فى العلو جار للسفل
او شريك فى الحقوق
اذ كان طريق
العلوفي تلك الدار
فكان الشريك فى
عين البقعة اولى
ولو كان لرجل علو
على وارة و طريقه
فيها وبقية الدار
آخر فباع حاصل
العلو والعلو بطريقه

to any person except to the neighbour of the property sold, for now the property is deemed to be a single entity distinct from the enclosure, and in one individual's ownership. This is according to the *Muhibb of Sarakhs*.

33. The lower story of a house is shared between two persons, and the upper story is shared between one of the sharers of the lower story and some other person. Now a sharer sells his share in the lower as well as in the upper story. In this case, the sharer in the lower story is entitled to demand pre-emption in the lower story; and the sharer in the upper story is entitled to demand pre-emption in the upper story. There is no pre-emption for the sharer in lower story in the upper one and *vice versa*, for the partner in the lower story is a *jār* to the upper one, or at the utmost he is a partner in the right of way provided the way of the upper one passes through the lower story. Similarly the partner in the upper story is a *jār* to the lower or at the most he is a partner in the right of way, and under the law person who is the partner in the thing itself is preferred to all. If a person owns the upper story of a

ففي الاستحسان تجحب الشفعة لصاحب السفل ولو كان طريق هذا العلو في دار رجل آخر فيبيع العلو فصاحب الدار التي فيها الطريق أولى بشفعة العلو من صاحب الدار التي عليها العلو فإن سلم صاحب الطريق الشفعة فإن لم يكن للعلو جار ملازق أخذة صاحب الدار التي عليها العلو بالجوار وإن كان للعلو جار ملازق أخذة بالشفعة مع صاحب السفل لأنهما جاران وإن لم يكن جار العلو ملازقا وبين العلو وبين مسكنه طائفة من الدار فلا شفعة له ولو بائع صاحب السفل السفل كان صاحب العلو وشفيعا ولو بيعت الدار التي فيها طريق

house and the way of the upper story passes through a certain house, which belongs to some other person, then if the owner of the upper story sells it together with its way, then according to *Istihsan* the owner of the lower story is entitled to demand it in pre-emption, however since the way of the upper story passes through the house of some other person, then that person through whose property the way of the upper floor leads is preferred to the owner of the lower story. If the partner in the way surrenders his right and there is no *Jar-i-Mulāzīq* to the upper floor who may demand pre-emption, then the owner of the lower story over which the upper stands is entitled to pre-empt it by reason of neighbour-hood, but if there is *Jar-i-Mulāzīq* contiguous neighbour, then the owner of the lower story would demand pre-emption together with *Jār-i-Mulāzīq* because they both are *Shāfi'i-jār* however if that pre-emptor was not a *bona fide Jār-i-Mulāzīq* that is there was a strip of land between the upper story and his house, then he is not entitled to demand pre-emption at all. If the owner of the lower story sells his property then the owner of the upper floor

العوْفُ صاحبُ الْعِلْمِ
حق بشفعة الدار
من الحجار هكذا
في البدائع -

٣٣ - دار بين رجلين ولا حدّهما
حائط في الدار
بينه وبين آخر
فباع الذي له شركة
في الحائط نصيبيه
من الدار والحائط
فالشريك في الدار
اً حق بشفعة الحائط
والشريك في الحائط
أولى بالحائط وهو
حجار في بقية الدار
وكذلك دار بين رجلين ولا حدّهما
بشر في الدار
بينه وبين آخر
فباع نصيبيه من
الدار و البئر
فالشريك في الدار
اً حق بشفعة الدار
والشريك في البئر
اً حق بالبئر وهو حجار
بقية الدار كذا
في النهاية - ، اذا

is its pre-emptor; and if the house from which the way of the upper story passes is sold, then as regards pre-emption the owner of the upper story is preferred to any other *Shaf'i-i-jār*. This is according to the *Bādaiyī*.

34. A house is shared between two partners, and one of them and some other person own one of its walls, in common partnership. Now the person who has the share in the house as well as in the wall sells it, then the partner in the house is preferred in demanding pre-emption in the house, and the partner in the wall is preferred in demanding pre-emption in the wall, and he (the latter) is a mere *Shaf'i-i-jār*, with reference to the rest of the house. And similarly if there is a house shared by two persons, and one of the sharers with some other person owns a well in the house. Now the person who is a partner in the house as well in the well sells his share in both, then as regards pre-emption in the house the partner in the house is preferred and as regards the well the partner in the well is preferred and the partner in the well is a mere *Shaf'i-i-jār*, with reference to the house. This is according to the *Nihāya*. A house is

كانت الداريين ثلاثة رجال الا موضع بئر او طريق فيها فباع الشريك في الجميع نصيحة من جميع الدار فالشريك الذي له في جميع الدار نصيب احق من الآخر الذي له في بعض الدار نصيب فان شركة اعم ومن يكون اقوى فهو مقدم في الاستحقاق كذا في المبسوط -

٣٥ - صاحب الطريق او لي بالشقة من صاحب مسيل الماء اذا لم يكن موضع مسيل الماء ملكا له وصورة هذا اذا بيعت دار ولرجل فيها طريق ولآخر فيها مسيل الماء صاحب الطريق او لي بالشقة من صاحب مسيل الماء كذا في المحيط -

٣٦ - دار فيها ثلاثة بيوت بيت في اول الدار ثم البيت الثاني بجنبه هذا البيت ثم البيت الثالث بجنب

shared between three partners, but the well and the way in it is not so shared. Now the person who is a partner in the house sells his share, then the other person who is a partner in the whole house has a preferential right to demand pre-emption in it than a person who is a partner in the way or the well only, because the person who is the partner in the whole house has a special right, and one who has the superior claim is entitled to demand pre-emption. This is according to the *Mabsut*.

35. A person who has a right of way has a superior right of pre-emption to the person who has merely a right of water, and the bed of the water course does not belong to him. For example, when a house is sold, and a person has a right of way to it and the other person has the right of water across it, then the person who has the right of way has a superior right of pre-emption than the person who has the right of water. This is according to the *Muhit*.

36. In an enclosure there are three adjacent houses in a row : all belonging to different persons ; and one of these houses is sold, then if there is a common way within the enclosure to all the houses, the right

الثاني كل بيت لرجل واحد فباع واحد منهم بيته ان كان طريق البيوت في الدار كانت الشفعة للباقيين بحكم الشركه في الطريق و ان كانت ابواب البيوت في سكة نافذه لا في الدار فان بيع البيت الا وسط الشفعة لصاحب الاعلى و السفل وان بيع لبيت الاعلى كانت الشفعة لصاحب الا وسط و ان بيع الا سفل كانت الشفعة لصاحب الا وسط لا غير ثلاثة بيوت في دار كل واحد فرق لآخر كل واحد لانسان فباع واحد منهم بيته فان كان طريق الكل في الدار فلباقيين ان يشتري كا في الشفعة و ان كانت ابواب البيوت في السكة فان باع الا وسط فلا على والا سفل ان يأخذ الشفعة و ان باع الا على فالا وسط او اى وان باع الا سفل فالا وسط ايضا او اي هكذا في خزانة المفتين -

of pre-emption belongs to the other two owners by reason of partnership in the way ; but if the doors of these houses are situated on the public road and not in the enclosure and the middle house is sold, then the right of pre-emption belongs to the owners of the first and the third houses, while if the first house or the third house were sold, then it belongs to the owner of the middle house. This is according to the *Khirānat-ul-Muftīn*.

٣٧ - ١٥ ار فيها ثلاثة ابيات ولها ساحة والساحة بين ثلاثة نفرو البيوت بين اثنين منهم فباع احد مالكي البيوت نصيبه من البيوت والساحة من شريكه في البيوت والساحة فلا شفعة لشريكهما في الساحة كذا في الذخيرة دار لرجل فيها بيت بينه وبين غيره فباع الرجل الدار فطلب الجار الشفعة و طلبها الشريك في البيت فصاحب الشريكة في البيت اولى بالبيت وبقية الدار بينهما نصفان هكذا في البداع -

٣٨ - وروي عن ابي يوسف فيمن اشتري حائطا بارضا ثم اشتري مالقي من الدار ثم طلب جار الحائط الشفعة فله الشفعة في الحائط ولا شفعة

37. In an enclosure there are three houses and a ground. The ground is owned between three individuals and the houses between two of them. Now one of the owners of the houses sells his share in the houses as well as in the ground to the person who is also a partner in the houses as well as in the ground, then the two persons who are partners in the ground only are not entitled to demand pre-emption. This is according to the *Zakhira*. A man owns an enclosure in which there is a house belonging to him and another person and he sells the enclosure whereupon a neighbour (of the enclosure) claims pre-emption, and pre-emption is also claimed by the partner in the house. In this case, as regards the house the latter is preferred ; but with regard to the rest of the enclosure, they both are equally entitled. This is according to the *Badayi'*.

38. And it is reported from Abu Yusuf, that when a person purchases a wall with the ground on which it stands and thereafter purchases the mansion, whereupon the neighbour of the wall claims pre-emption, then he is entitled to pre-empt the wall and not the mansion.

له في بقية الدار
كذا في محيط
السريري -

٣٩ - درب غير
نافذ فيه دور لقوم باع
رجل من ارباب
تلك الدور بيته
شارعا في السكة
العظمى ولم يبع
طريقه في الدرب
على ان يفتح
مشتري البيت بما
الي الطريق الا
عظم غلا صحاب
الдорب الشفعة
شركتهم في الطريق
وقت البيع فان
سلموها ثم باع
المشتري البيت
بعد ذلك غلا شفعة
lahel الدرب لانعدام
شركتهم في الطريق
وقت البيع الثاني
فتكون الشفعة للحجار
الملازق وهو صاحب
الدار، وكذلك اذا
باع قطعة من الدار

This is according to the *Muhit* of *Sarakhsī*.

39. There is a blind *darb*,¹ in which there are enclosures belonging to a certain tribe. Now, one of the owners of the enclosures sells his house situated in the thoroughfare on the condition that the vendee of the house should open another door towards the highway and he retains the right of way to his own property situated in the *darb*, then in this case the people of the *darb* have the right of pre-emption by reason of their being partners in the way at the time of sale, but if the people of the *darb* surrender their right in favour of the vendee, and later on the vendee sells that house, then at the time of second sale the people of the *darb* will have no right of pre-emption because their partnership in the way has been extinguished, and in this case the right of pre-emption belongs to the *Jār-i-Mulāzīq*, that is, the owner of the enclosure himself and similar is the case if the owner had sold a part of the enclosure

¹. An habitation in the middle of which there is a ground and round which there are mansions belonging to several owners.

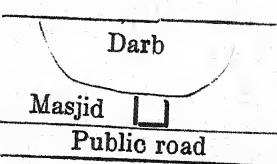
بغير طريق في الدرب
كذا في الذخيرة -

٢٠ - درب غير
نافذ في اقصاه مسجد
خطة وباب المسجد
في الدرب و ظهره
المسجد او جانبه
الآخر الي الطريق
الاعظم فهذا و رب
نافذ لو بيعت فيه
دار لاشفعة الالحجار
واراد بمسجد
الخطة الذي اختطه
الامام حين قسم
بيين الغانيين وهذا
لان المسجد اذا
كان خطة و ظهره
الي الطريق الاعظم
وليس حول المسجد
دور تحول بيته وبين
الطريق الاعظم
فيهذا الدرب بمنزلة
درب نافذ ولو كان
حول المسجد دور
تحول بيته وبين
الطريق الاعظم كان
lahel darb الشفعة

without the way in the *darb* itself. This is according to the *Zakhira*.

40. There is a blind *darb* at the extreme end of which there is a *masjid-i-Khitṭa* and the door of the *masjid* is in the *darb*, and the back of the *masjid* or its other side is towards the public thoroughfare, then such a *darb* is a blind *darb*. Now if a house in the *darb* is sold, then the right of pre-emption does not belong to any one except the neighbour. By *masjid-i-Khitṭa* is meant that *masjid*, whose boundaries are defined by the *Imām* at the time of apportionment of the booty. However this is a case of *masjid-i-Khitṭa* whose back is towards a thoroughfare, and has no houses between it and the thoroughfare; but if there are houses around the *masjid* and between it and the thoroughfare, then such a *darb* is an open *darb*. Then the people of such *darb* have the right of pre-emption on account of partnership. If there is no *masjid-i-Khitṭa* at the extreme end, and it is situated in the first lane, and if the *darb* is continuous from the first

Darb.
Masjid Khitta.
Public road.



بالشركة لأن هذا
الدرب لا يكون نافذا
ولو لم يكن مسجدا
الحظة في الاقصى
لكنه كان في أول
السكة فان كان
من أول السكة
الي موضع المسجد
نافذ لاتثبت فيه
الشفعه الاللخار
الملاقي وما وراء
ذلك يكون غير نافذ
حتى كان لأهل ذلك
السكة كلهم الشفعه
ولو لم يكن المسجد
خطة بان يشتري
أهل الدرب من
رجل من أهله دارا
في اقصي الدرب
ظرها الي الطريق
الاعظم وجعلوها
مسجدا وجعلوا في
الدرب بابه ولم
 يجعلوا الله الي
الطريق الاعظم ببابا
وجعلوا اثمه باع رجل
من اهل الدرب
داره فلا هيل الدرب
الشفعه بالشركة
كذا في المحيط -

lane to the *masjid*, then the right of pre-emption does not belong to any one except the *Jar-i-Mulāzīq*. However if there be no *masjid-i-Khitta*, but the people living in the *darb* purchased a house and converted it into a *masjid* and its door is towards the *darb*, though not necessarily facing it and one of the members of the *darb* sells his house, then the people of the *darb* are entitled to demand pre-emption in it by reason of partnership. This is according to the *Muhīt*.

٢٦ - رجل له خان فيه مسجد افروة صاحب الخان وادن للناس بالتنا دين وصلوة الجماعة فيه فعلوا حتى صار مسجدا ثم باع صاحب الخان كل حجرة في الخان من رجل حتى صار درباثم بيعت منها حجرة قال محمد الشفعة لجميدهم كذا في فناوى قاضي خان دار فيها طريق الى الدرب ويلخرج من باب آخر منها الى الطريق الاعظم فان كان طريقا للناس فلا شفعة لاهل الدرب لأن السكة نافذة وان كان طريقا لاهل الدرب خاصة بهم شفعا لأن السكة غير نافذة كذا في محيط السرخسي - واما الرقيقات التي ظهرها واد لا يخلو من وجهين ان كان موضع الوادي مملوكا في الاصل واحد ثوا الوادي فهذا و المسجد الذي

41. A person has an inn in which there is a *masjid*, and the owner of the inn has separated it from the inn and he permits the people to offer their prayers in it. The people have acted accordingly, and it is thereby transformed into a public *masjid*. Thereafter the owner of the inn sells all its apartments to different persons so that now it becomes a *darb*. Subsequently one of its apartments is sold, then according to Imam Muhammad, the owners of other apartments are entitled to pre-empt it. This is according to the *Fatāwā-i-Kazi Khan*. There is a mansion, the way of which is towards the *darb*, and a passage passes through it leading into a public road. Now if the way is public, then the people of *darb* have no pre-emption because the lane is an open one; but if the way is the property of the people of *darb* then they have the right of pre-emption, because now it is a blind lane. This is according to the *Muhīt of Sarakhsī*. The case of *Zigāq* on the back of which there is a *wādī* (valley) has two aspects:—(a) If the site of the valley is in somebody's ownership, and the people had turned it into a *wādī* (valley), then as regards the law of pre-emption the case of such a valley and the *masjid*

احد ثوا في اقصي السكة سواء وان كان في الاصل واديا كل للكفه و مسجد المخطة سواء هكذا حكي عن الشیعی الامام الزاهد عبد الواحد الشیباني⁷ وكان يقول الریقات التي علی ظهرها واد بیخارا اذا بیع فی ذقیقة منها دار فأهل الریقة کلهم شفعا ولا يجعل ذلك كالطريق النافذ شکانه عرف انه مملوك وكان الشیعی الامام شمس الائمة السرجی⁸ يجعل حکم هذه الریقات حکم السکك النافذة قبل وبجوزان يقاس التي في اقصاها الوادي بیخار اعلى ما تقدم وبين امر الشفعة على النفذ المحادث على نفذ المخطة کذا في المحیط - سکة لجميع اهل السکة ولا فرق بين المدورة والمعوجة والمستقيمة کذا في الملتقط -

built at the extreme end of the land are the same. (b) If the *wādī* was originally a valley; then as regards pre-emption the case of this valley and the *masjid-i-Khitta* are the same. It is mentioned by Imām Shaikh 'Abdul Wāhid Shaibānī that if one of the houses of *Ziqāqs* of Bukhara, at the back of which there is a valley, is sold, then all the people of *Ziqāqs* are its pre-emptors and it will not be considered as a public place. It seems that Imām Shaibānī has ascertained the valley to be private. Imām Shaikh Sarakhsī maintains that the effect of such *Ziqāqs* as regards pre-emption is similar to that of an open lane. (Some jurists) hold that it is lawful to consider the case of *Bukhārā* at the extreme of which there is a valley, in terms of what has been said above and pre-emption should be made dependent upon this consideration. This is according to the *Muhīt*. In a blind lane if a house is sold, then the right of pre-emption belongs to all the inhabitants of the lane, it is immaterial whether the blind lane was circular, curve or straight. This is according to the *Multaqat*.

٣٢ - سكة غير نافذة
فيها عطف مدور يبر
بالعطف الذي يقال
بالفارسة (خم كرون)
وفي العطف منازل
فيغير جل منزل اي اعلى
السكة او سفلها او في
العطف فالشفعه
لجميع الشركاء
وان كان العطف
مربعابان يكون
سكة مدوردة في كل
جاذب منها قيمة
وفي السكة دور وهي
الشققتين دور فناع
رجل في العطف
منلا فالشفعه
لاصحاب العطف
دون اصحاب السكة
ولو باع رجل في
السكة دارا كانوا
فيها جميعا شفعه
والحاصل ان بالعطف
المدور لا تصير السكة
في حكم السكتين
الايري ان هيات
الدور في هذا
العطف لا تغير

42. In a blind lane there is a 'atf mudawwar,* a circular round tract of land which is known in Persian as "Kham gird." In this tract 'atf there are houses and the owner of one of them sells a house which is situate on the upper or lower end of the street or is situated on the curve itself, then the right of pre-emption belongs to all the partners. If this tract 'atf is a square so that a lane extends from every corner of it to the *Ziqāq*, and there are houses in a lane as well as in *Ziqāq* and a person sells a house in the 'atf tract, then pre-emption appertains to the members of the tract and not to the inhabitants of the lane; but if a person sells a house in the lane, then all of them are its pre-emptors. The result is that because the 'atf is round, *mudawwar*, the lane, as regards, its effect is not treated like two distinct lanes, and in such an 'atf, the situation of



كما في السكة
زقيقان اما العطف
المربع يصير في
حكم سكة اخرى
الايري ان هيأت
الدور في هذا
العطف تتغير فيصير
بمنزلة سكة في سكة
كذا في الذخيرة -
٣٣ - سكة تذهب
طولاً في اسفلها
سكة اخرى غير
نافذة بينها حاجز
دربي ولا حق لأهل
السكة الاولى فيها
فيبيعون دار من السكة
العليا فلا هم
السفلي الشفعة
لشركتهم ولو بيعت
من السفلي فالشفعة
لأهلها خاصة، كذا
اذا كان فيه زائفة كذا
في القنية في المنتقى
ابن سماعة عن ابي
يوسف [ؑ] عن ابي
حنيفة [ؑ] في درب
فيه زائفة مستديرة
لجميع الدرب يباع
دار في هذه الرائفة
التي عليها الدرب

the houses is not changed similarly as in the case of a lane. But if the 'atf is a square, then it is treated as distinct lanes and the situation of the houses is changed. It becomes as if there is a lane within a lane. This is according to the *Zakhira*.

43. A lane runs to a long distance and at the extreme end of it there is another blind lane. These two lanes are separated by a *darb*. The people living in the former lane are not interested in the latter lane. If a house is sold in the former lane, then the people of the latter lane have the right to pre-empt it on account of their partnership; but if a house is sold in the latter lane, the people of the latter lane also have the right of pre-emption. And similar would be the case if there is a *zaigha'* (turning) in the above mentioned lane. This is according to the *Qunya*. It is mentioned in the *Muntaqi* by Abu Samā'ah who received the report from Abu Yusuf and who in his turn received it from Imam Abu Hanifa that if there is a *darb* in which there is a round turning surrounding the whole *darb*, and if on this turning a house is sold, then all

فهي شركاء في الشقة
وإذا كان درب
مستطيل فيه دائمة
ليست على معاويفه
لك ولكنها تشتمل
السكة فاعمل تلك
الدائمة شركاء في
دورهم ولا يشركهم
أهل الدرب في
الشقة وقال أبو
يوسف ^{رض} ذلك كله
سواء وهم شركاء
في زايغتهم دون
أهل الدرب كذا
في الدخيرة -

٢٣ - هشام عن
محمد ^{رض} رجل
اشترى بيتاً من دار
الي حنب داره و
فتح بابه إلى دارة
ثم باع هذا البيت
وحدة فجاء حار هذا
الرجل وطلب هذا
البيت بالشقة قال
ان كان سدياب
البيت من تلك
الدار وفتح في هذه
الدار حتى عند
البيت من هذه
الدار فله الشقة
فيه وفي الشقة
للحسن بن زياد

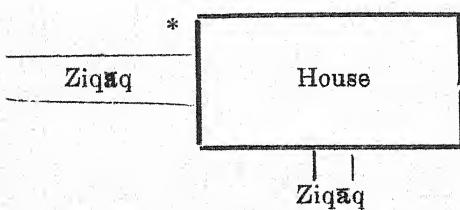
persons are entitled to pre-empt it ; but if the *darb* is a long one and there is a turning, but not of the description as mentioned above, it resembles a lane, then the right of pre-emption in the house on the turning would appertain to the people living on the turning only and not to the people living in the *darb*. Imam Abu Yusuf holds that these two cases are identical and the people of the *darb* are pre-emptors in the house sold in the *darb*, and people on the turning are pre-emptors in the house sold on the turning. This is according to the *Zakhira*.

44. A person buys an apartment in a house adjoined to his house, and opens a door from it towards his own house, thereafter he sold this apartment alone. The pre-emptor now appears and demands pre-emption in the apartment. As regards this case Hishām reports from Imām Muhammad that if the vendee had closed the original door and opened one towards his own house, so that the room formed part of the vendee's house, then the neighbour would be entitled to demand pre-emption. It is mentioned in the book of pre-emption by Hasan Ibn Ziyād that there is a blind lane in

سکة غير خالفة فيها
عطفة منفردة نفذت
هذه العطفة من
جانب آخر الى هذه
السکة التي فيها
العطفة فبيعت دار
في هذه العطفة فلا
شفعه فيها الا لمن
داره لزريق الدار
المبيعة ولو لم تنفذ
هذه العطفة الى
السکة كانت الشفعة
لجميع اهل هذه
العطفة فان سلموا
الشفعة ليس لاهل
السکة الشفعة فيها
كذا في المحيط-
دار بيعت و لها
بابان في ذيقيين
تینینترا ان كانت في
الاصل دارین باب
احمد هما في رقاق
آخر غاشترا همار جل
واحد ورفع الحائط
بینهم ما حتى صارت
كلها دار او واحدة
فلاهل كل رقاق ان

which there is a separate 'atfi' plot of land, which is connected with the lane and a house in this plot of land is sold, then the right of pre-emption does not arise in favour of any person except the *Jār-i-Mulāzīq* of the house sold. However, if this 'atf' is not connected with the lane, then pre-emption belongs to all the people living in the 'atf' and if they give up their right, then also the people of the lane are not entitled to pre-empt the house. This is according to the *Muhīt*. A house,* which has two doors opening into two *Ziqāqs*, is sold, then it will be considered whether the house was divided into two houses, that is, whether it originally had one door each opening in a different *Ziqāq* and a person, having purchased it, removed the intervening wall between them and so it became a single house, if so then the people living in each *Ziqāq* will be entitled to pre-empt that part of the house which

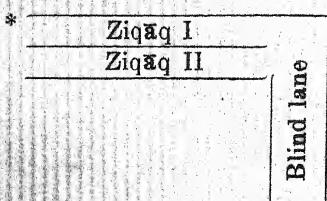
*



يأخذ الجباب الذي
بلدية وإن كانت في
الأصل داراً واحدة
ولهَا بابان فالشقة
لأهل الرثاقين في
جميع الدار بالسوية
ونظير هذا الرثاق
إذا كان في أسفلها
رثاق آخرأى جميع
الجانب الآخر
فرفع الحاجط بينهما
حتى صارت الكل سكة
واحدة كان لأهل
كل رثاق شقة في
في الرثاق الذي
لهما خاصية ولا شقة
لهما في الجباب
الآخر وكذا سكة
غير نافذة دفع
الحاجط من أسفلها
حتى صارت نافذة
فهي فيها شركاء كذا
في محيط السريري -
٢٥ - وفي آخر شقة
الأصل دار فيها
حجرة منها بين
رجلين فباع أحد
هما نصبيه من

adjoins it. But if the house originally had two doors then the people living in the two *Ziqāqs* are equally entitled to pre-empt the whole house. To illustrate* further if there is a *Ziqāq* and below it there is another *Ziqāq* and below it there is another *Ziqāq*, thereafter the intervening wall which separates the two *Ziqāqs* is removed so that it now becomes one big street, then the people of each *Ziqāq* have a right of pre-emption in the property sold in their own *Ziqāq*, and would not be entitled to pre-empt the property in the other. And similarly if the wall of a blind lane is removed so that it becomes open, then all the people of the lane would be entitled to pre-emption by reason of partnership (in the way). This is according to *Muhīt* of *Sarakhsī*.

45. It is written in the *Shaf'at-ul-Asl* that if there is a house in which there is an apartment shared between two persons, and one of them sells his share of the



الحجارة فهذا على
ووجهين ان كانت
الحجارة مقسومة
بينهما فالشقة
للسور كا في طريق
الدار لا للشريك
في الحجارة ثان سلم
شركاء الطريق في
الدار الشقة كانت
الشقة للحجار
الملاقي بالدار
كذافي المحيط -
و اذا اشتري
قوم ارض افتقسم
ها دور اوتر كوا
منها سكة مشي لهم
وهي سكة ممدودة
غير نافذة فيبعث
دار من اقصاها
شم جبعا شركاء
شي شقعتها ومن
كان داره اسفل
من الدار المبيعة
او اعلى في الشقة
هنا سواء وكذلك
ان كانوا ورثوا
الدور عن آبائهم
كذلك ولا يغرون
كيف كان اصلها
فهذا الاول سواء
كذافي المسوط
في باب الشقة
في البناء وغيرها -
و اذا اشتري بيتا
من دار عليه آخر
و طريق البيت

apartment to a stranger then this case has two aspects:—(a) If the apartment had been divided between them, then pre-emption belongs to all partners in the way of the house and not only to the partner in the apartment. (b) If all such partners of the way in the house surrender their right; then *Shuf'a* appertains to the *jär-i-mulāzīq* of the house. This is according to the *Muhīt*. A party purchases a land and distributes it among its members, giving them each such portion of it as is sufficient for a house, they also leave in it a blind street for communication purposes. A house is sold at the extreme end of the lane, then the members are entitled to pre-empt it and it makes no difference whether the house of the neighbour is on the upper or lower side of the house sold. And similarly if they had inherited the property from their ancestors and were not aware of full facts, then in this case also the law is the same. This is according to the *Mabsūt* in the chapter on pre-emption. If such a house is purchased in an enclosure, the upper story of which belongs to some other person, and the way of the house purchased lies in another enclosure, then

الذى اشتري فى دار اخرى فانما الشفعة للذى فى دارة الطريق فان سلم صاحب الدار فتحيند لصاحب العلو الشفعة با لجوار كذا فى المبسوط فى باب الشفعة بالعروض -

٤٦ - و اذا كان للدار جاران احد هما غائب والآخر حاضر فنخاصم الحاضر الى قاض لاي裡 الشفعة با لجوار فابطل شفعة ثم حضر الغائب فنخاصمه الى قاض يرى الشفعة فقضى له بجميع الدار ولو كان القاضي الاول قال ابطل كل الشفعة التي تتعلق بهذه الدار لم تبطل شفعة الغائب كذا قاله محمد وهو الصحيح كذا في البدائع -

the right of pre-emption belongs to the person through whose enclosure the way passes. If the owner of the enclosure surrenders his right, then the right of pre-emption belongs to the owner of the upper story of the house by reason of neighbourhood. This is according to the *Mabsūt* in the chapter on *Shufa' fil-Uruz*.

46. And if there are two *shafi'-i-jars* but one of them is absent and the other is present. And the present *shafi'-i-jār* brings a suit before the *Kazi*¹ who does not decree *shuf'a biljawār* pre-emption on the ground of neighbourhood, and the *Kazi* invalidates the right and dismisses the suit. Thereafter the absentee pre-emptor appears and brings his suit before the *Kazi*² who decrees *Shufa-bil-jawār* and the *Kazi* decrees the whole house to him, though the first *Kazi* had said, "I invalidate all right of pre-emption which appertains to this house," nevertheless the right of the absentee is not invalidated. Imām Muḥammad holds the same view, which is correct. This is according to the *Badā'yī*.

¹ Here the *Kazi* administers the *Shafi'* Law.

² This *Kazi* administers the *Hanafi* Law.

٢٧ - دار ورثتها
 جماعة عن أبيهم
 مات بعض ولد
 أبيهم وترك نصيحة
 ميراثاً بين ورثة
 وهم ثلاثة بنين
 فباع أحد لهم نصيحة
 منها فشركاؤه في
 ميراث أبيهم وهو
 أبناء الميت الثاني
 وشريكه الأب وهو
 أولاد الميت الأول
 شفعاء فيها ليس
 بعضهم أولى من
 البعض كذا في
 المحيط - للحسين
 بن زياد قوم ورثوا
 داراً فيها منازل و
 اقتسموها فاصاب كل
 واحد منها منزل فرفعوا
 فيما بينهم الطريق
 فباع من صارله
 منزله وسلم الذي له
 لهم المنازل في
 الدار الشفعة كان
 للحجار الشفعة اذا
 كان لزيق المنزل
 الذي يبيع وان كان
 لريق الطريق الذي
 بينهم وليس لزيق
 المنزل كان له ان
 يأخذ المنزل بطريقه
 بالشفعة وان لم
 يكن لريق المنزل
 ولا لريق الطريق
 الذي بينهم وكان

47. A person died and he left a house in inheritance to his heirs, later on a certain heir died and he left his share in inheritance to his three sons as his heirs. Later on one of the sons sold his share of the inheritance, then the right of pre-emption equally belongs to the descendants of the vendor's father and grandfather and no one from amongst them has a preferential right as against the other. This is according to the *Muhit*. In the chapter on pre-emption by Hasan Ibn Ziyad it is stated that a certain tribe inherited an enclosure in which there were several houses. Thereafter these members of the tribe divided the enclosure among themselves each receiving a house for himself and leaving a common way. Thereafter one of the members sells his house and all other owners of the houses surrender their right of pre-emption in the house, then the right appertains to the contiguous neighbour of the enclosure. Thus if he were a contiguous neighbour to the enclosure and not to the house, then also he has a right to pre-empt it by virtue of neighbourhood ; and if he were not a contiguous neighbour to the enclosure, but is a contiguous neighbour to

لربيع منزل آخر
من الدار فلا شفعة
في هذه المسئلة دليل
على أن الشفعة
كما تجنب لجيران
المبيع تجنب لجيران
حق المبيع أيضاً
كذا في الدخيرة -

وفي كتاب
الشرب لأبي عمر
والطبراني دار فيها
ثلاثة البيوت وكل
بيت لرجل على
حدة و طريق كل
بيت في هذه الدار
و طريق هذه الدار
في دار أخرى
وطريق تلك الدار
في سكة غير ذا فدفة
مبيع بيت من
البيوت التي في
الدار الداخلية كان
صاحب البيوتين
أولى بالشفعة من
صاحب الدار
الخارجة فإن سلم
الشفعة فالشفعة
صاحب الدار
الخارجة فإن سلم
هو أيضاً فالشفعة
لا هل السكة أرض
يدين قوم انتسوا بها
يدينهم ورفعوا أطريقها
يدينهم وجعلوا أنفاقها
ثم بنوا دور أيمدة
ويسرة وجعلوا أبواباً

some other houses of the lane, then he has no right of pre-emption. This illustrates the view that the right of pre-emption arises in favour of a neighbour and it also arises in favour of the person who is the neighbour to the enclosure. This is according to the *Zakhīra*. In the chapter on *Shurb* by Abu 'Umar al-Tabarī, there is mentioned a case of an enclosure in which there are three houses owned by three different owners. The houses have a common way through the enclosure and that the way of this enclosure passes through another enclosure and the way of that enclosure opens into a blind lane. Now if a house on the inner enclosure is sold, then the owners of the two houses have a preferential right to the owner of the outer enclosure and if they surrender their right, then it belongs to the owner of the outer enclosure, and if he also surrenders it, it belongs to all persons living in the street. A land which belonged to several persons jointly, was apportioned among its sharers and they left a common way in it and made it an open way. Thereafter they built houses on the right and left of the way; with the doors of the houses towards the lane. Subsequently

الدور شارعة الي السكة فباع بعضهم دارا فالشقة بينهم سواء وان قالوا اجعلناها طريقا للمسلمين فكذلك الجواب ايضا قال الصدر الشهيد هو المختار كذا في المحيط -

one of them sold his house, then the right of pre-emption belongs equally to all of them. And if they say "we have made it a way for the Muslims" then also the same effect follows. Sadrus Shahid says that the same view is expressed in *Mukhtār*. This is according to the *Muhib*.

٣٨ - ولو ان رجلا اشتري دارا في سكة غير نافذة ثم اشتري دارا اخرى في تلك السكة كان خذ الاولى بالشقة لأن المشتري لم يكن شفيعا وقت الشراء الاول ثم صار هو شفيعا مع اهل السكة في الدار الثانية كذا في الظاهرية - دار بين ثلاثة نفر فاشتري واحداً رجل نصيبهم واحداً بعد واحد فللجار ان ياخذ الثالث الاول وليس له على الثلثين الباقيين سبيل ولو كانت الدار بين اربعة نفر فاشتري الثالث نصيب واحداً بعد واحد

48. A person bought a house in a blind lane, thereafter he bought another house in the same lane. Then the people of the lane have the right to pre-empt the first house only, because the vendee was not its pre-emptor at the time of its sale but at the time of the second sale, he had become a pre-emptor along with the people of the lane. This is according to the *Zahiriyya*. A house belongs to three persons and a person buys their shares one after another. Then the *Shafi'-i-jār* is entitled to pre-empt the first one-third share and has no right to demand the next two-thirds shares. If a house belongs to four persons and a person buys the shares of the three sharers one after another while the fourth sharer is absent, thereafter the absentee appears, then he is entitled to pre-empt the share of the first sharer; and as regards the two

والرابع غائب ثم
حضر فله ان يأخذ
نصيب الاول وهو
في نصيب الاخرين
شريكه ولو اشتري
احد الاول بعده
نصيب الا ثنين
واحداً بعده واحد
ثم حضر الرابع كان
شريك في النصيبيين
جميعاً كذا في
محبطة السريري
وغي الهاوري دار
بين ثلاثة ففراشتري
رجل نصيب احدهم
ثم جاء رجل آخر
اشتري نصيب آخر
ثم جاء الثالث
الذي لم يبيع نصيبيه
كان له ان يأخذ
النصيبيين جميعاً
بالشفعه فإن لم
تحضر الثالث حتى
جاء المشتري الاول
إلى المشتري الثاني
فطلب منه الشفعه
كان له ذلك ويقصى
له بها فيصير له
النصيبيان جميعاً
جاء الثالث بعد
ذلك وكان غائباً
وطلب الشفعه أخذ

other shares he would be a "partner-pre-emptor" along with the vendee.¹ If one of the four sharers buys the shares of two of them one after another, thereafter the fourth appears, then he would be a "partner-pre-emptor" in the two shares.¹ This is according to the *Muhīt-qf-Sarakhsī*. It is mentioned in the *Hārūni* that if a mansion is shared by three persons and a person purchases a share of one of them, and another person purchases the share of the next sharer ; thereafter the third sharer who has not sold his share appears, then he is entitled to demand both the two shares in pre-emption but if the third sharer did not appear until the first vendee went to the second vendee and demanded pre-emption from him, then the first vendee is entitled to pre-emption and a decree would be given in his favour, and hence the second share would also pass into his ownership. Afterwards if the third absentee sharer appears and demands pre-emption, then he is entitled to pre-empt the first share which the vendee purchased first and half of the second share purchased next.¹ However, if

¹ That is, the absentee pre-emptor and the vendee are both equally entitled.

جميع ما اشتراه الاول
و نصف ما اشتراه
الثاني ولو لم يقض
القاضي للمشتري
الاول بما اشتراه
الثاني قضى للثالث
بالنصبيين جميعا
كذا في المحيط -

٢٩- لرجل مسيل
ماء في دار بيعت
كانت له الشفعة
بالجوار لا بالشركة
وليس المسيل كالشروب
كذا في الناقار
خانية - و اذا كان
نهر لرجل في ارض
لرجل عليه رحى
ماء في بيت فباع
صاحب النهر النهر
والرحى والبيت فطلب
صاحب الأرض الشفعة
في ذلك كله فله
الشفعة وان كان بين
ارضه وبين موضع
الرحى ارض لرجل
وكان جانب النهر
الآخر لرجل آخر
فطلب الشفعة على ما
ان يأخذنا ذلك
بالشفعة لأنهما
سواء في الجوار
الي النهر وان
كان بعضهم اقرب
الي الرحى كذا

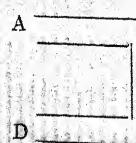
the third sharer appears and demands pre-emption at a time when the Kazi has not yet decreed pre-emption to the first vendee in the second sale, then a decree will be made in his favour entitling him to pre-empt the entire two shares. This is according to the *Muhīt*.

49. A house has been sold and a person has *Haqq-i-Masīlulmā'* the right of passage for water across the property sold, then he is entitled to demand pre-emption in it by reason of neighbourhood (*Jawār*). The *Haqq-i-Masīlulmā'* does not resemble right of drawing water, *Shurb*. This is according to the *Tātar Khāniyya*. A person owns a stream of water which passes through the land of another person. On this stream there is a water mill. Now the owners of the stream and the mill-house have sold them, thereupon the owner of the land demands pre-emption in them all, he is entitled to do so. Similarly if between his land and the site of the mill, there is a plot belonging to another person and the other side (bank) of the river belongs to a different person, then they also are entitled to demand pre-emption, because they are in the neighbourhood of the stream, though it is possible that some one

في المسبوط - ذهر
كبير كدجلة تجري
لقوم منه ذهر صغير
فضارب شرب
اراضيهم من هذا
النهر الصغير فباع
رجل من اهل هذا
النهر الصغير ارضه
بشر بها كان للذين
شربهم من هذا
النهر الصغير ان
يأخذوا تلك الأرض
بالشفعة اقصاهم
وادناهم فيها سواء
فإن كانت مع الأرض
التي يبيع قطعة
أخرى لزقة بهذه
الارض المبعة وشرب
هذه القطعة من
النهر الكبير فلا
شفعة لصاحب القطعة
مع الذين شربهم
من النهر الصغير
في كتاب حلال
البصري في ذهر ملتو
يبع فيه ارضون خلف
الاتواه او قبله فان
كان الاتواه ثغر يبع
 فهو كنهرين فتكون

may be a nearer neighbour to the mill. This is according to the *Mabsūt*. If from a large stream like the Tigris, another small canal is branched out for a certain tribe and their lands are irrigated by this small canal, and then one of the members of the tribe on the small canal, sells his land with the right of *shurb*, the right of irrigating the land, then all those, who have the right of irrigation from this small canal are equally entitled to demand pre-emption, irrespective of the fact whether they are nearer or farther off from the land. And if another piece of land attached to the land sold is watered by the larger canal, then the owner of this piece of land is not entitled to demand pre-emption with those who have the right to irrigate their land from the small canal. In the book of *Hilālāl-Baṣrī* it is stated that on a *Nahr Multawī* (a canal having several turns) some lands situated on the turnings are sold now if the turnings of the stream could be considered as distinct canals,¹ then pre-emption would arise in

¹ i.e.,



B AB, BC and CD
will be con-
sidered as dis-
tinct canals.

الشفعه للشركاء في الشرب الا لتواء موضع الا لتواء خاصه فان سلمو فهـي للبدائين من اهل النهر وان كان الا لتواء باستداره وانحراف كانت الشفعه لهم جميعاً وجعلهـو كالنهر الواحد في المنتقى بن ساعـة عن محمد^ص نهر بين قوم ولهم عليهـه ارضـون والبسـاتين شرـدـها من ذلك النهر وهم شركـاء فيهـ فلـهم الشـفعـه فيما بـيعـ من هـذه الارضـيـة والبسـاتـين فـان اـتـخـذـوا من تـلـكـ الـرضـيـنـ والـبسـاتـينـ دـورـاـ واستـغـنـواـ عـنـ ذـلـكـ المـاءـ فـانـهـ لـالـشـفعـهـ بـيـنـهـمـ الـأـلـاـ بالـجـوارـ بـمنـزـلـةـ دـارـ الـمـصـارـ وـانـ بـقـيـ منـ هـذـهـ الـرـضـيـنـ ماـيـزـرـعـ وـبـقـيـ منـ هـذـهـ الـبسـاتـينـ ماـيـحـتـاجـ إـلـيـ السـقـيـ فـهـمـ شـرـكـاءـ فـيـ الشـربـ عـلـىـ حـالـهـمـ وـشـرـكـاءـ فـيـ الشـفعـهـ كـذـاـ فـيـ المـكـيـطـ

favour of the persons living on that turning, and if they surrender their right, then it belongs to all people interested in the right of water. However if the turning is a mere curve or is circular then the right of pre-emption arises in favour of all persons, for the jurists consider it as a single canal. Ibn Samā'ah who receives the report from Imām Muḥammad mentions in the *Muntaqā* that a tribe owned a canal, where they had their lands and gardens irrigated by the canal. Since the members of the tribe are equal partners, so they all are pre-emptors in the property sold from amongst these lands and gardens. However, if they have turned their lands and gardens into houses and have nothing to do with the water of the canal, then they are entitled to pre-emption only by reason of neighbourhood as is the case as regards the houses situated in the city. But if there remain certain lands which are cultivated and certain gardens which are irrigated, then their owners respectively as stated above retain *inter se* the right of pre-emption. This is according to the *Muhīt*.

٥٠ - ذهريه شوب

لقوم وارض النهر
لغيرهم فباع رجل
ارضه والماء منقطع
في النهر فلهم
الشفعة في قول
محمد^ص وفي قياس
قول ابي يوسف^{رض}
لأشفعة لهم بحق
الشرب اذا كان
الماء منقطعا كما
في العلو المهدوم
كذا في فتاوى
قاضي خان -

٥١ - واذا اشتري

الرجل نهرا باصله
ولرجل ارض في
اعلاه الى جنبه
ولرجل آخر ارض في
سفله الى جنبه
غلوهما جميعا الشفعة
في جميع النهر من
اعلاه الى اسفله
وكذا القناة والعين
والبشر في من
العقارات يستحق
فيها الشفعة بالجوار
وكذلك القناة يكون
مفتتحها في ارض

50. A certain tribe has the right of water from a canal while the bed of the canal belongs to a certain other tribe. One of the members of this tribe sells his land at the time when the water of the canal is dried up, then according to Imām Muḥammad in this case also they all are entitled to pre-empt it, but applying *Qiyās* Abu Yusuf holds that they have no right by reason of right of water since the water of the canal is dried up, just as is the case with the owner of upper story of a house when it is destroyed. This is according to the *Fatāwā-i-Qāzī Khān*.

51. If a person purchases the whole area of a canal and two other persons own lands on the upper and lower sides on the banks of the canal then they both are equally entitled to demand pre-emption in the whole of the canal from the upper to the lower end of it. Similar is the case of *Quinnāt*, streams canals and wells. These are deemed as '*aqārs* whereupon pre-emption arises by reason of *Jawār* (neighbourhood). And similarly if a *Quinnāt*, stream, has its source in the land of one person while it flows and falls in the land of some other person; then all its neighbours

ويظهر ماوها في
راض اخرى فلغير انها
من مقتاحها الى
مصبها شركاء في
الشفعه واذا كان
نهر لرجل خالصالة
عليه ارض ولاخرين
عليه اراض ولامشرب
لهم فيه فباع رب
الارض النهر خاصة
فهم شركاء في
الشفعه فيه لا تصال
ملكتهم بالبيع وان
باع الارض خاصة
دون النهر فالملائق
للارض اولا هم
بالشفعه وان باع
النهر والارض جميعا
كانوا اجمعين شفعاء
في النهر لا تصال
ملك كل واحد
منهم بالنهر وكان
الذى هو ملاصق
الارض اولا هم
بالشفعه في الارض
لاتصال ملكه بالارض
بمنزلة طريق في دار
لرجل فباع الطريق
والطريق خالص
له بمحاجة الطريق

from the source of the stream to its mouth are entitled to pre-emption. And when a canal belongs to a single person who has his lands there, while other lands situated there belong to some other person who are not entitled to *shurb*, the right of water from this canal, subsequently the owner sells the canal, then also all who own lands situated on the canal are pre-emptors on account of neighbourhood, but if he sells the land only without the canal, then the *jār-i-mulāzīq* of the land would be preferred to all; but if he sells the canal as well as the land, then they all are pre-emptors in the canal only on account of their properties being adjoined to the canal, while the *jar-i-mulāsiq* would be preferred in pre-empting the land to all on account of his property being adjacent to the land sold. This corresponds to the case of the way which lies through the enclosure of a certain person, and is his sole property, this way is sold, then here the neighbour of the way would be preferred to the neighbour of the land, and if he is a partner in the way also, then he would pre-empt the house, because a partner is preferred to *shafī-i-jār*, and similarly if

اوكي به من من جار
الارض ولو كان
شريك في الطريق
احد شفعة من
الدار لأن الشريك
مقدم على الجار
وكذلك أن كان
شريك في النهر
احد بحصة من
الارض وكان احق بها
جميعاً من غير ان
الارض والطريق والنهر
سواء في كل شيء كذا
في المبسط -

- ٥٤ - رجل لعدة صيبي
في نهر فهو احق
بالشفعة من يجري
النهر في ارضه كذا
في فتاوى قاضي خان -
و اذا كان نهر اعلاه
لرجل واسفله لآخر
محراً في ارض رجل
آخر فاشترى رجل
نصيب صاحب اعلى
النهر فطلب صاحب
الارض وصاحب
السفلي النهر الشفعة
فالشفعة لهما جميعاً
بالجوار وكذلك
لو اشتري رجل
نصيب صاحب اسفل
النهر فالشفعة لصاحب

he is a partner in the canal, then he would be entitled to pre-empt the land, and he has a preferential right as against all the neighbours. Hence as regards the way and the canal, the law is the same. This is according to the *Mabsūt*.

52. If a person is a sharer in a certain canal then he is preferred to that person across whose land the canal flows. This is according to the *Fatāwā-i-Qazī Khān*. When the upper side of a canal belongs to a certain person, and the lower side of it to another person and it flows across a third person's land, now if a stranger purchases the share of the owner of the upper side of the canal, thereafter the person through whose land the canal flows as well as the owner of the lower side of the canal demand pre-emption, then they both are equally entitled to pre-empt by reason of neighbourhood (*javār*). And similarly if a stranger purchases the share of the person who owns the lower side of the canal then the right of pre-emption arises in

الاعلى بالجوار
وكذلك لو كانت
قناة مفتوحة بين
رجلين الى مكان
معلوم واسفل من
ذلك لا حد فيما في باع
صاحب الاسفل
ذلك الاسفل فالشريك
والجيران فيه سواء
اذا كان ذهر لرجل
فطلب اليه رجل
ليكري منه ذهرا
الي ارضه ثم بيع
النهر الاول ومحباه
في ارض رجل آخر
صاحب الارض اولى
بالشقة كذا في
المبسوط

٥٣ - وفي نوادر
بن سمعة عن
محمد^د دار في
سكة خاصة باعها
صاحبها من رجل
بلا طريق فلا هل
السكة الشقة وكذلك
لو باع ارضا بلا
شرب فلا هل الشرب
الشقة ولو بيعت
هذه الدار وهذه

favour of the owner of the upper side of the canal on account of *Jawār* (neighbourhood). And similarly if the source of a stream (*kunnat*), which is shared between two persons upto a definite place, while the rest of it belongs to one of them only, and he (the owner of the lower part) sells it, then the partner and the *shafī-i-jār* have equal right of pre-emption in it. If a person owns a canal and some other person requests him to permit him to branch out a small canal from this canal to irrigate his land and the owner permitted him to do so, and a small canal was led from it to irrigate his land, thereafter the canal was sold, then as regards pre-emption the owner of the land is preferred. This is according to the *Mabsūt*.

53. In the *Nawādir* of Ibn Samā'ah, it is reported from Imām Muḥammad that in the case of a sale of a house situated in a private lane to a person without the way, the right of pre-emption belongs to all members of the lane. And similarly if a person sells a land without the right of *Shurb*, water, then the people interested in the right of water are entitled to pre-empt it. And if this house and the land were sold

الارض مرة اخرى
فليس لهم فيها
الشقة هكذا في
الظاهرية قال محبـد^٢
في قراح واحد في
وسطه ساقية حاربة
شرب هذا القراب
منها من الجانبيـن
فبـيع القراب فـي
شـفيعـان أحـد هـما
يلـي هـذه النـاحـة
من القرـاح والـاخـرـيـليـ
الـجانـبـ الـاخـرـ قالـ
هـما شـفـيعـانـ فـيـ القرـاحـ
وـلـيـسـ السـاقـيـةـ مـنـ
حقـوقـ هـذـاـ القرـاحـ
فـلاـ يـعـتـبرـ فـاصـلاـ
كـالـحـائـطـ المـتـدـ
ولـوـ كـانـتـ هـذـةـ
الـسـاقـيـةـ بـجـوارـ
الـقرـاحـ وـيـشـربـ منـهاـ
الفـ جـرـيبـ خـارـجاـ
مـنـ هـذـاـ القرـاحـ
فـصـاحـبـ السـاقـيـةـ
أـحـقـ بـالـشـفـعـةـ مـنـ
الـجـارـ كـذـاـ فـيـ
الـبـداـيـعـ -

a second time, then they would not be entitled to demand pre-emption again.¹ This is according to the *Zahiriyya* Imām Muḥammad says that if a field through which a small canal (*sāqiyā*) passes irrigating the two sides, is sold, thereafter two pre-emptors appear one of whom has his property adjoined to one side of the canal and the other has his property adjoined to the other side, then they both are entitled to pre-empt the field. This canal is not an appendage of the field, and hence it cannot be considered as boundary line like a wall. If this canal is in the neighbourhood of the field and it is used for irrigation purposes about one thousand *jaribs* then the owner of the canal has a preferential right to that of *Shāfi'-i-jār*. This is according to the *Badāyi*.²

¹ Because of their surrender of the right on the first sale, but the nearest neighbour by reason of neighbourhood would be entitled to pre-empt it.

الباب الثالث

في طلب الشفعة

٥٣ - الشفعة تجحب

بالعقد والجحود

تناء كد بالطلب والا

شهاده ويتملك بالأخذ

ثم الطلب على ثلاثة

أنواع طلب مواثيقه

وطلب تقرير وشهادة

وطلب تمليلك

اما طلب المواثيق فهو

انه اذا علم الشفيع

بالبيع ينبغي ان

يطلب الشفعة علي

الفور و ساعتها اذا

سكت ولم يطلب

بطلاق شفعة وهذا

رواية الاصل والمشهور

من اصحابنا وروى

هشام عن محمد²

ان طلب في

مجلس العلم فله

الشفعة والا فلا

بمنزله خيار المختيرة

و الخيار القبول ثم

اختلفوا في كيفية

CHAPTER III

THE DEMAND OF PRE-EMPTION

54. The cause of the right pre-emption is sale and neighbourhood *jawār*, it is confirmed by *talab*, and *Ish-hād*, and is perfected by taking possession. The demand is of three kinds:—*Talab-i-Muwāsabat*, the immediate demand; *Talab-Ish-had*, the demand with invocation, and *Talab-i-Tamlik*, the demand of possession. By *Talab-i-Muwāsabat* is meant that when a person entitled to pre-emption hears of a sale, he must claim his right immediately at the very instant, and if he remains silent without claiming the right, it will be extinguished. This is the accepted view of our jurists, and is according to the *Asl*. Hishām narrates another report from Imām Muḥammad that it is deemed sufficient compliance with the law if the demand is made at any time during the meeting at which the information is received, here the law is the same as in the case of *Khiyār-ul-Mukhyira*¹ and *Khiyār-ul-Qubūl*.² The jurists differ as regards the expression in which the demand

¹ This has reference to *Tafwīz-ul-talāq* delegation of power of divorce to the wife.

² The right to propose and accept the contract of marriage.

لِفَظِ الْطَّلْبِ وَالصَّحْبِ
 اِنَّهُ لَوْ طَلَبَ الشَّفْعَةَ
 بِأَيِّ لَفْظٍ يَفْهَمُ مِنْهُ
 طَلَبَ الشَّفْعَةِ جَازَ
 حَتَّى لَوْ قَالَ طَلَبَ
 الشَّفْعَةِ وَاطْلَبَهَا
 وَإِنَّهُ اطْلَبَهَا جَازَ
 وَلَوْ قَالَ لِلْمُشْتَرِي
 إِنَّا شَفِيعُكَ وَأَخْدُ
 الدَّارَ مِنْكَ بِالشَّفْعَةِ
 بَطَلَتْ وَإِذَا عَلِمَ
 الشَّفِيعُ بِالبَيْعِ فَقَالَ
 الْحَمْدُ لِلَّهِ وَسَبَحَانَ
 اللَّهِ وَاللَّهُ أَكْبَرُ
 أَوْ عَطَسَ صَاحِبَهُ فَشَتَّتَهُ
 أَوْ قَالَ السَّلَامُ عَلَيْكَ
 وَقَدْ طَلَبَتْ شَفْعَتَهَا
 لَا تَبْطِلُ شَفْعَتَهَا
 وَكَذَلِكَ لَوْ قَالَ مِنْ
 اشْتَرَاهَا وَبِكَمْ اشْتَرَاهَا
 إِذَا قَالَ بِالْفَارَسِيَّةِ
 (شَفَاعَتْ خَوَاهِمْ)
 بَطْلُ شَفْعَةِ وَالْطَّلْبِ
 فِي الْبَيْعِ الْفَاسِدِ
 يُعْتَبَرُ وَقْتُ انْقِطَاعِ
 حَقِّ الْبَاعِيْلَوْ وَقْتُ
 شَرَايِهِ فَامْنَأَيِ الْبَيْعِ
 الْفَضُولِيِّ أَوْ فِي
 الْبَيْعِ بِشَرْطِ الْخَيَارِ
 لِلْبَاعِيْلَعْنَدَ ابْنِي
 يُوسُفٍ يُعْتَبَرُ الْطَّلْبُ

should be expressed, and the correct view is that any words indicating a clear intention to pre-empt are sufficient, e. g., if a person should say, "I demand pre-emption or I have demanded pre-emption or I demanded pre-emption;" then it is deemed lawful. But if he were to say to the vendee, I am thy pre-emptor, and I shall take this house in pre-emption, then such a demand is insufficient, the right of pre-emption would be extinguished. And if the pre-emptor when he is informed of the sale says 'God be praised' or 'Glory to God' or 'God is great' or if one of his companions sneezes, he says 'God bless you' or says 'Peace be on you' thereafter says "I demand pre-emption," then his right of pre-emption is not invalidated and similarly if he enquires as to who has purchased it and for what price, but if he says in Persian 'Shafā'at' Khwāham,¹ then his right of pre-emption is invalidated. In the case of an invalid sale, the proper time for making the demand is not at the time of purchase, but when the sellers' right is entirely extinguished. As regards

¹ For the word *Shafā'at* is not the same as *Shuf'a*.

وقت البيع وعند محمد^ص يعتبر وقت الاجارة وفي الهمة بشرط العرض روايتان في رواية يعتبر الطلب وقت القبض وفي رواية يعتبر وقت العقد ولو سمع الشريك والجار بيع الدار وهما في موضع واحد وطلب الشريك الشفعة وسكت الجار ثم ترك الشفيع الشفعة ليس للجار ان يأخذ الشفعة دار بيعت لها شفيعان واحد هما غائب وطلب الحاضر نصف الدار بالشفعة بطلت الشفعة وكذا لو كانوا حاضرين وطلب كل واحد منهما الشفعة في النصف بطلت شفعتهما كذا في محيط السر خسي -

the sale *bai'-Fuzūlī* and the sale in which option is reserved by the vendor, Imām Abu Yusuf says that the proper time to demand pre-emption is the time of sale, but Imām Muḥammad holds that it is at the time of the confirmation of the sale. And with regard to a *Hiba-bi-Shartil-'iwaz* gift with a condition for return, there are two reports (a) according to one view the time when mutual possession is interchanged should be taken into consideration (b) according to the other view the time of the gift is important, if a neighbour and a partner should hear of a sale at the same time, both being in one place, and the partner makes the demand, while the neighbour remains silent thereafter if the partner were to waive his right, then the neighbour would not be entitled to claim pre-emption at all. If a mansion is sold in which two persons have the right of pre-emption, and one of them is absent while the other is present, and the present pre-emptor claims half the mansion, then his right is annulled, so also if both were present and each were to claim pre-emption in half of the mansion, then their right would be annulled. This is so according to the *Muhit-of Sarakhsī*.

٥٥ - ثم عملة
 بالبيع قد يحصل
 بمساعدة بنفسه وقد
 يحصل باخباره غيره
 لكن هل يشترط
 فيه العدد والعدالة
 اختلف اصحابنا
 فيه قال ابو حنيفة^ر
 يشترط احد هذين
 اما العدد في المخبر
 رجلان او رجل
 وامراةان واما
 العدالة وقال ابو
 يوسف ومحمد^ر لا
 تشترط فيه العدالة
 ولا العدد حتى
 لو اخباره واحد
 بالشفعة عدلا كان
 المخبر او فاسقا حرا
 او عبدا ماذونا بالغا
 او صبيا
 او انشى فسكت ولم
 يطلب على فور
 الخبر على رواية
 الاصل او لم يطلب
 في المجلس على

55. Sometimes the pre-emptor himself receives the news of the sale by being present at the sale, and sometimes he is informed by another person. In the latter case, whether the number and trustworthiness of the informants are a necessary condition, as in the case of witnesses, is a disputed question among our jurists. Imām Abu Ḥanīfa says that it is an essential condition that there should be one or other of these conditions satisfied. That is, either the required number, two men, or one man and two women, or the trustworthiness of the informant is essential while according to Abu Yusuf and Muḥammad neither number nor trustworthiness is a necessary condition. So that if a person were to give information of the sale, and if the pre-emptor remains silent, then his right would be extinguished, of course provided the information proves to be correct and it is immaterial whether the informant is a trustworthy person or not or whether a *māzūn* slave, or whether adult person or a minor. Thus if the pre-emptor remains silent and expresses no opinion whether immediately as stated in the *Asl* or before the end of the meeting as required by Imām

رواية محمد^ب بطلت
شفعة عند هما
اذا ظهر كون الخبر
صادقاً وذكر الكرخي
ان هذا اصح
الروایتين كذا في
البداع - و ان كان
المخبر رجلاً واحداً
غير عدل ان صدقه
الشفيع في ذلك
ثبت البيع بخبرة
بالجماع وان كذبه
في ذلك لا يثبت
البيع بخبرة وان
ظهر صدق الخبر
عند ابي حنيفة^ج و
عند هما يثبت
البيع بخبرة اذا
ظهر صدق الخبر
كذا في الذخيرة
ـ ٥٦ـ واما طلب
الشهاد فهو ان
يشهد على طلب
المواشة حتى
يتتأكد الوجوب با
طلب علي الفور
وليس الاشهاد شرطاً
لصحة الطلب لكن
يتوثق حق الشفعة
اذا انكر المشتري
طلب الشفعة فيقول
له لم تطلب الشفعة
حين علمت بذلك
تركك الطلب وقمت

Muhammad then according to the two disciples his right of pre-emption would thereby be extinguished. Karkhī has stated that out of the last two views the latter is the better view. This is according to the *Badāyi'*. Hence though the information is given by one untrustworthy person, yet if the pre-emptor believes him, then the sale is deemed to have taken place according to all jurists, but if he disbelieves the informant, the sale is not deemed to have taken place according to the Great Imām even though later on the information proves to be true, but according to the two disciples if the information proves to be true, the sale must be deemed to have taken place. This is according to the *Zakhra*.

56. By *Talab-i-Ishhād*, or demand with invocation of witnesses, is meant the calling of witnesses by the pre-emptor to attest the *Talab-i-Muwāsabat* the immediate demand and his right of pre-emption is thereby strengthened. The invocation of witnesses is not required to give validity to the demand, but only to provide the pre-emptor with proof, should the vendee deny the demand, saying 'You did not demand your right, when you heard of the sale, nay,

عن المجلس و
الشفيع يقول طلب
فالقول قول المشتري
غلا بد من الاشهاد
وقت الطلب توثيقا
وانما يصح
طلب الاشهاد بحضور
المشتري او ابا العابع
او المبيع فيقول
عند حضرة واحد
منهم ان فلانا
اشترى هذه الدار
او دارا ويدرك حدود
ها الرابعة وانا
شفعيتها وقد كنت
طلب الشفعة وانا
اطلبها لكي فأشهدوا
على ذلك ثم
طلب الاشهاد معتبر
بالتمكن من الاشهاد
فمتى تمكن من
الاشهاد عند حضرة
واحد من هذه
الأشياء ولم يطلب
الاشهاد بطلت
شفعة فيما للضرر
عن المشتري فان
ترك القريب من
هذه الشفاعة وذهب
الي الا بعد ان كان
الكل في مصر واحد
لا تستغل شفعة
استحسانا وان كان
الا بعد في مصر

you abandoned your right, and rose from the meeting; while on the other hand, the pre-emptor asserts 'I did demand' and since under the law the word of the vendee may be trusted, it is necessary to call on witnesses to attest the *Talab-i-Ishhād* in order to give validity to the *Talab-i-Muwāsabat*. Hence it is required that *Talab-i-Ishhād* should be made in the presence of the vendee or vendor, or on the premises, the subject of sale. And the person claiming the right of pre-emption should say, in the presence of one or other of these, 'Such a person has purchased this mansion; or a mansion (specifying its boundaries), and I am its pre-emptor, and have demanded pre-emption, and now do demand it, bear you witness to this.' The validity of this demand is finally determined by the ability to do so. If a person is able to make the demand in the presence of one or other of these but does not do so, then the right of pre-emption is thereby extinguished with a view to prevent further injury to the vendee. If the pre-emptor leaves the nearest place and goes to the more remote (all being in the same city), even then according to the doctrine of *Istihsān*

آخر او في قرية من قرى هذا المصر بطلت شفعة لأن مصر الواحد مع نواحية وأماكنه جعل مكان كل واحد ولو كان الكل في مكان حقيقة وطلب من ابعد ها وترك القرب جاز فكذا هذا الا ان يصل الي الا قرب ويد عب الي الا بعد فتحينش تبطل وان كان المبيع لم يقبض فهو بالخيار ان شاء اشهد على طلبه عند البائع والمبيع وان كان المبيع في يد المشتري ذكر الكرخي في التوادر لا يصح الا شهاد علي البائع ونص محمد في الجامع الكبير انه يصح الا شهاد عليه بعد تسليم المبيع استحسانا لا قياسا كذلك في محيط السرخسي -

the right of pre-emption is not annulled and similarly it is not annulled if the remote place be in another city or in one of the suburbs of the same city (the suburbs of a city are not considered as one single place). But if these places are actually in one city, and the demand is made at the most remote place thus abandoning the nearest, then it is still lawful; unless indeed the pre-emptor having arrived at the nearest place (does not demand pre-emption) subsequently goes to the most remote for in this case the right would obviously be annulled. If the vendee has not taken possession of the property sold, then the pre-emptor has the option, and may, if, he pleases, make the demand in the presence of the vendor or at the premises. But if the possession has been taken by the vendee, then according to *Karkhi* it is not valid to take witnesses and make the demand in the presence of the vendor. Imām Muḥammad, however, has expressly stated in the *Jāmi' Kabīr* that according to *Istihsān* (Equity) but not *qiyās*, analogy, it is lawful to do so even after the delivery of possession to the vendee. This is according to the *Muhit* of *Sarakhsī*.

٥٧ - وانما يحتاج
إلى طلب المواتية
ثم إلى طلب الشهاد
بعدة اذا لم يمكنه الا
شهاد عنده طلب
المواتية بان سمع
الشراء حال غيبة عن
المشتري والبائع
والدار اما اذا
سمع عند حضرة
هؤلاء الثلاث و Ashton
علي ذلك فذلك
يكفيه ويقوم مقام
الطلبيين كذا في
خرافة المفتين واما
طلب التمليل فهو
المرافعة لي قاضي
لبيضى لحال شفاعة ولو
ترك الخصومة ان
كان يعذر نحو
مرض او جس او
غيره ولم يمكنه
التو كيل لم
تبطل شفاعة فان
ترك من غير عذر
لا تبطل شفاعة
عند اي حنية
وهو احدى الروايتين
عن اي يوسف
كذا في محيط
السرخسي -

57. The *Talab-i-Muwāsabat* or immediate demand is first necessary, and if at the time of making the first demand there was no opportunity of invocation of witnesses, then the *Talab-i-'Ishhād* or demand with invocation should be made, as for instance, the pre-emption was informed about the sale in the absence of the vendor, the vendee, and not at the premises, but if he heard it in the presence of any of these, and had called on witnesses to witness the demand, then it would suffice for both demands. This is according to the *Khizāntul-Muftīn*. By the *Talab-i-Tamlik*, or the demand of possession, is meant the bringing of the matter before the *Kāzī* judge, so that he may decree the property to the claimant by reason of his right of pre-emption. If the pre-emptor neglects to litigate the matter for a sufficient reason, such as sickness, imprisonment, or the like, and cannot appoint an agent, the right of pre-emption is not annulled, and according to Abu Ḥanīfa, and one report of Abu Yusuf, even though he should neglect to do so without a sufficient reason, the right would not be annulled. This is according to the *Muhiṭ*.

وهو ظاهر المذهب
وعلية الفتوى كذا
في المهدائية - وعن
محمد و زفر^ر وهو
روایة عن أبي يوسف^ر
ان اشهد وترك
المحاصصة شهرًا من
غير عذر تبطل شفعة
والفتوى على قولهما
كذا في محيط
السريري -

٥١ - وصورة طلب
التمليك ان يقول
الشافعى للقاضى ان
فلانا اشتري دارا
وبين محلتها وحدودها
دها واناشفى به بدار
لي وبين حدود دها
فمرة بتسليمها الى
 وبعد هذه الطلب
ايضا لا يثبت الملك
للشافعى في الدار
المشفوعة الا بحكم
القاضى او بتسليم
المشتري الدار اليه
حتى ان بعد
هذا الطلب قبل
حكم القاضى بالدار
له وقبل تسليم
المشتري الدار اليه
لو بيعت دارا اخرى
يتجنب هذه الدار
تم حكم له المحاكم

This is the approved doctrine of the *Hanafī* school, and the *Fatwā* is given according to it. This is according to the *Hidāya*. But according to Imām Muḥammad and Zufar, and by another report of Abu Yusuf also, if the pre-emptor were to call on witnesses to his demand, and yet should neglect to file a suit for a month¹ without a sufficient excuse, the right of pre-emption is annulled. This is according to the *Muhīt*.

58. The proper form for making the *Talab-i-Tamlīk* is for the pre-emptor to say before the Court *Kāzī* that such a person has purchased a mansion (describing its situation and boundaries), and I am its pre-emptor by reason of a house belonging to me (the boundaries of which he should also explain). Pray order him, therefore, to deliver the mansion to me. However simply by this demand, the mansion does not become his property unless the judge passes order for its delivery or until the vendee of his own accord delivers the property to the pre-emptor, so that if before either decree or delivery has taken place, another adjacent property is sold, and thereafter the judge passes his decree,

¹ According to Anglo-Muhammadan Law the period is one year (Limitation Act 1908.)

او سلم المشتري
الدار اليه لا يستحق
الشفعه فيهاو كذلك
لو مات الشفيع
او باع داره بعد
الطلبيين قبل حكم
الحاكم او تسليم
المشتري تبطل شفعة
ذكر الشخص ذلك
في ادب القاضي
وللشفيع ان يتمتع
من الأخذ بالشفعة
وان بذلك المشتري
حتى يقضى القاضي
له بها كذا في
المحيط - و اذا رفع
الامر الى القاضي
فان القاضي لا يسمع
دعواه الا بحضوره
الشخص فان كانت
الدار في يد البائع
يشترط لسماع
الدعوى حضرة البائع
والمشتري لأن الشفيع
يطلب القضايا بالملك
واليد جميعاً والملك
للمشتري واليد للبائع
فشرط حضورهما
وان كانت الدار في
يد المشتري كفاه
حضره المشتري كذا
ني فتاوى قاضي
خان - و اذا كان

or the property is delivered by the vendee, then the pre-emptor has no right of pre-emption in the property recently sold. In like manner, if the pre-emptor should die or sell his own house after making the demands, but before the order of the judge, or delivery of the property by the vendee to him then the right of pre-emption becomes extinguished. This is according to the *Adāb-ul-Kāzī*. The pre-emptor is entitled to refuse to take the mansion, though the vendee is willing to give its delivery, until the judge has decreed it in his favour. This is according to the *Muhīt*. When the pre-emptor brings the suit demanding pre-emption, while the mansion is still in the possession of the vendor, then it is a condition to the hearing of the suit that both the vendor and the vendee should be present (as parties to the suit) because the pre-emptor is suing both for ownership and possession, the former being with the vendee and the latter with the vendor. But if the mansion is in the possession of the vendee, then his presence alone is sufficient for the hearing of the case. This is according to the *Fatāwā-i-Qāzī Khān*. If the pre-emptor is absent, then after he has received

الشفيع غائباً يوجل
بعد العلم قدر
مسيرة الطلب للأشهاد
فإن حضر هو
أو كيله والابطلت
شفعته وإن قدم
وغاب وشهد على
الطلب فهو على
شفعته لأن عند
امي حنفة بتا
خير طلب التمليك
لا تبطل شفعته
وعند هما تبطل
الا بعد روهنا
ترك طلب التمليك
بعدر فإن ظهر
المشتري في بلد
ليس فيه الدار لم
يكن على الشفيع
الطلب هناك وإنما
يطلب حيث الدار
كذا في محظط
السرخسي - الشفيع
إذا علم بالشراء
وهو في طريق مكة
فطلب طلب لمواشة
وعجز عن طلب
الا شهاد بنفسه
يوكل وكيله يطلب
له الشفعة فإن لم
يفعل ومضى بطلب
شفعة وإن لم يوجد
من يوكله فوجد

the information of sale he would be allowed a sufficient time to make the demands and if he and his agent appears within a reasonable time, so much the better, otherwise his right of pre-emption would be annulled. And if he appears and goes away after making *Talab-i-Ish hād* his right continues according to Abu Hanifa because by delaying *Talab-i-Tamlik* the right of pre-emption is not annulled; but according to his two disciples the right of pre-emption would be annulled if there is no sufficient cause for delay. And if the vendee happens to be in a certain city while the property sold is in another town, then the pre-emptor is not obliged to make his demand there, but he should make his demand at the place where the property is situated. This view is expressed in the *Muhit of Sarakhsī*. If the pre-emptor hears of a sale while en route to Mecca, and there he makes *Talab-i-Muwāsabat* but is unable to make *Talab-i-'Ish hād* personally, then he should appoint an agent (*vakil*) to make this demand on his behalf, but if he does not do so, and continues his journey, his right of pre-emption is annulled. And if he does not find any one whom he could appoint his agent,

فيجا يكتب على
يدية كتاباً ويوكل
وكيله في الكتاب
فإن لم يفعل بطلت
شفعته وإن لم يجد
وكيله ولا فيجا
لا تبطل شفعته حتى
يجد الفيج
كذا
في الظاهرية - رجل له
شفعه عند القاضي
يقدمه إلى السلطان
الذي تولى القضاء
منه وإن كانت
شفعه عند السلطان
فامتنع القاضي من
إحضاره فهو على
شفعة لأن هذا
عذر كذا محيط
الشخصي -

٥٩ - الشفيع إذا

علم في الليل
ولم يقدر على
الخروج ولا شهاد
فإن أشهد حين
اصبح صر كذا
في الخلاصة قال ابن
الفضل إذا كان
وقت خروج الناس
إلى حوائجه يخرج
ويطلب كذا في
الحاوي - الفتاري

but finds a person (*fija*, a scribe or messenger), then he should have a letter sent through him appointing an agent and if he does not do so, his right of pre-emption would be invalidated, but if he neither finds an agent nor a scribe, nor a messenger then his right of pre-emption continues until he finds one of them. This is according to the *Zahiriyyah*. If a person has a right of pre-emption against a *Kāzī* judge, then he should present the judge before the Sultan who has appointed him and if he has a right of pre-emption against the Sultan and the *Kāzī* judge refuses to summon the Sultan, then his right of pre-emption continues, because there exists a sufficient excuse. This is according to the *Muhiṭ* of *Sarakhsī*.

59. If the pre-emptor is informed of sale at such a time in the night that he cannot go out to demand *Talab-i-Ishhād*, thereafter if he makes the demand early in the morning as soon as the sun rises it would be valid. This is according to the *Khulāṣa*. If he receives the information at such a time that people usually go out to do their work, then he must proceed to make the demand. This is the view of Ibn Fazl

اليهودي اذا سمع
البيع يوم السبت
فلم يطلب بطلت
شفعته كذا في
خزانة المقتين -
شفيع بالجوار
اذا خاف انه لو
طلب الشفعة عند
القاضي والقاضي لا
يرى الشفعة بالجوار
تبطل شفعته قلم
يطلبه فهو على
شفعته لانه ترك بعد
كذا في محيط
السر خسى -

and is according to the *Hāwī*. According to the *Fatāwā*, if a Jew receives information of sale on a Saturday, and he does not make the demand, then his right of pre-emption is annulled. This is according to the *Khizānat-ul-Muftīn*. If the *Shafī-i-Jār* is afraid of demanding pre-emption before a *Kāzī* of the *Shāfi‘i* school who does not decree *Shufa‘-bil-Jawār*, therefore he does not demand pre-emption, his right is not annulled because he has done so on account of a proper excuse. This is according to the *Muhīt* of *Sarakhsī*.

٤٠ - ١٥١ اشتري
رجل من اهل
البغى ١٥ ارا من
رجل في عسكرة
والشفيع في عسکر
أهل العدل ثان
كان لا يقدر على
ان يبعث وكيلًا
ولان يدخل بنفسه
عسكرهم فهو على
شفعته ولا يضره ترك
طلب الا شهاد
وان كان يقدر على
ان يبعث وكيلًا
او يدخل بنفسه
عسكرهم فلم يطلب
طلب الا شهاد
بتطلت شفعة كذا
في المحيط -

60 When an *Ahl-i-Baghy*, one of the rebels, purchases a house from a person in the rebel's army while its pre-emptor is in the army of *Ahl Haq*, the just people, and if he (the pre-emptor) is unable to send an agent or he himself is unable to enter the rebel force, then his right of pre-emption continues, and the delay in execution of the *Talab-i-Ishhād* is of no consequence ; but if it were possible for him to send an agent or to enter the force himself and then he did not make the demand, then his right of pre-emption would be annulled. This is according to the *Muhīt*. If the pre-emptor happens to be in the

الشفعي اذا كان
في عسكر الخوارج
او اهل البغي و خاف
على نفسه لود خل في
عسكر اهل العدل
فلم يطلب الا شهاد
بطلت شفعته لانه
 قادر بان يتوك
البغي فيدخل عسكرا
اهل العدل كذا
في محيط السرخسي-

٦١ - اذا اتفق
البائع والمشتري
ان الشفيع علم
بالشراء متذاماً
ثم اختلفا بعد
ذلك في الطلب
فقال الشفيع طلبت
منذ علمت وقال
المشتري ما طلبت
فالقول قول المشتري
وعلي الشفيع التنمية
ولو قال الشفيع
علمت الساعة وانا
طلبتها وقال المشتري
علمت قبل ذلك
ولم تطلب فالقول
قول الشفيع وحكي
عن الشیخ الامام
الرازد عبد الواحد
الشیعاني انه قال
اذا كان الشفيع
علم بالشراء وطلب
طلب المواتنة

force of *Khawārij* deserter or that of *Ahl-Baghy* rebels and is afraid to enter the army of *Ahl' Adl*, the just people, and hence he does not make the demand of *Talab-i-'Ishhād*, then his right of pre-emption is annulled, for it was possible for him to leave the enemy and enter the army of *Ahl' Adl*. This is according to the *Muhiṭ* of *Sarakhsī*.

61. If the vendor and the vendee agree that the pre-emptor some time ago received the information of sale but afterwards they disagree as to the making of *Talab* and the pre-emptor says, "I demanded pre-emption when I heard of the sale," while the vendee denies this statement, then the word of the vendee will be accepted and the pre-emptor will have to tender evidence. However if the pre-emptor says "I am informed of the sale just now, and I demand it," then the vendee says 'You heard of the sale long before, and you did not demand,' then the word of the pre-emptor will be accepted and the vendee will have to tender evidence. It is reported from Imām 'Abdul Wāhid Shāibānī that if a pre-emptor is informed of the sale, and he has made

حقه لكن اذا قال
بعد ذلك علمت
منذ كذا وطلببت لا
يصدق على الطلب
ولو قال ماعلمت
الا الساعة يكون
كاذبا فالحيلة في
ذلك ان يقول
لأنسان اخبرني
بالرشاء ثم يقول
الآن اخبرتني
صادقا وان كان
خبر ذلك وذكر
محمد بن مقاتل
في ذواخرة اذا كان
الشفعي قد طلب
الشفعة من المشتري
في الوقت المتقدم
ويخشى انه لو اقر
بذلك يحتاج الي
البينة فقال الساعة
علمت وانا اطلب
الشفعة يسعه ان
يقول ذلك ويختلف
على ذلك وليس ثنى
في بيته كذا
في المحيط - فان
قال المشتري للقاضي
حلفة بالله لقد
طلب هذه الشفعة
طلبا صحيحا ساعة
علم بالشراء من
غير تأخير فختلف
القاضي على ذلك
فان اقام المشتري
بيته ان الشفيع

Talab-i-Muwāsabat then his right is established, but if he says that after he was informed of the sale on a particular day he demanded pre-emption, then his statement need not be accepted and if he says that he heard of it only now, then he would be considered a liar for this may be a device which may be effected thus ; the pre-emptor may ask some one to inform him of the sale at that time, and thereupon he makes the statement that he heard about the sale just now, and he would obviously be speaking the truth for he actually received the information at that time. In the *Nawādir Muḥammad Bin Muqātil* mentions that when the pre-emptor has demanded pre-emption from the vendee some time before and is afraid that if he assert it he would have to call witnesses for it, and accordingly says that he is informed of it just now and he demands pre-emption then he may be allowed to say so on oath. This is according to the *Muhīt*. The *Kāzī* may ask the vendee to demand an oath from the pre-emptor on the fact that he has demanded pre-emption by a valid demand without delay, the moment he received the information of sale. If the vendee produces proof to the effect that the pre-

علم بالبيع منذ
زمان ولم يطلب
الشفعه واقام الشفيع
البنية انه طلب
الشفعه حين علم
بالبيع في البنية
بنية الشفيع والقاضي
يقضي بالشفعه في
قول ابي حنيفة
وقال ابو يوسف
البنية بنية المشتري
كذا في الذخيرة -
المشتري اذا انكر
طلب الشفيع الشفعة
عند سماع البيع
يختلف على العلم
وان انكر طلبه عند
لقائه حلف على
البنية كذا في
الملقط -

٦٢ - ٦٣ تقديم
الشفيع وادعى الشراء
وطلب الشفعة عند
القاضي يسأل القاضي
اولا المدعي قبل
ان يقبل علي
المدعي عليه عن
موضع الدار من
مصور محله وحدوده
حالانه ادعى فيها
حقا فلا بد ان
 تكون معلومة لأن

emptor received the information of sale a long time ago and he did not demand pre-emption, while the pre-emptor also produces evidence that he did demand pre-emption when he received the information of sale, then the evidence of the pre-emptor would be relied upon, and the *Kāzī* would decree *Shufa'* to him. This is so according to Imām Abu Hanifa, but his two disciples hold that the evidence of the vendee should be credited. This is according to the *Zakhīra*. If the vendee denies that the pre-emptor demanded pre-emption at the time of information of sale, then the vendee would be sworn as to the fact of information only, but if he denies that the pre-emptor demanded pre-emption when he met him then he would be sworn absolutely. This is according to the *Multaqit*.

62. When the pre-emptor brings a suit of pre-emption, the *Kāzī* judge, before accepting or admitting the suit against the defendant should ask him first respecting the town and street, and where the property is situated, and also its boundaries, for the pre-emptor is seeking to establish a right and it is necessary that the property should be definitely ascertained because a defec-

دعوي المجهول لاتصح فصار كما اذا ادعى ملك رقبتها فإذا بين ذلك ساله هل قبض المشتري الدار ام لا لانه اذا لم يقاضيها لاتصح دعواه على المشتري حتى يحضر البائع فإذا بين ذلك ساله عن سبب شفعة وحدود ما يشفع بها لأن الناس مختلفون فيه فلعله ادعاه بسبب غير صالح او يكون هو محظوظا بغيره فإذا بين سببا صالحا ولم يكن محظوظا بغيره ساله انه متى علم وكيف صنع حدين علم لا ذهب تبطل بطول الزمان وبلا عراض وبما يدل عليه فلا بد من كشف ذلك فإذا بين ذلك ساله عن طلب التقرير كيف كان وعند من اشهد وهل كان الذي سال عنده اقرب من غيره ام لا علي الوجه الذي بينا

tive suit is invalid. When this has been explained, the *Kazi* should ask him whether the vendee has taken possession of the property or not; for if the vendee has not taken possession, the suit is not valid unless the seller is also made a party to the suit; the *Kazi* should also enquire from the pre-emptor the cause of his right of pre-emption, that is the boundaries of the property by reason of which he claims his right, for there are different causes and he may perhaps be basing this claim on an interior cause that is he may be excluded by another person who has the superior right. After the pre-emptor has assigned a proper cause, and is not excluded by any other person, then the judge should ask him when he became acquainted with the fact of the sale, and how he acted on the occasion; for the right of pre-emption may be annulled by lapse of time, or by some other objection, therefore all this should be enquired. Thereafter the *Kazi* should ask him about the *Talab-i-taqrir*, or confirmatory demand, how it was, and before whom and where he made the demand at the nearest or the remote place. After all this has been explained, in a satisfactory manner the claim is complete as against the defend-

فإذا بين ذلك
 كله ولم يدخل من
 شروطه ثم دعواه
 وأقبل على المدعى
 عليه وسالة عن
 الدار التي يشفع
 بها هل هي ملك
 الشفيع أم لا وإن
 كانت هي في يد
 الشفيع وهي تدل
 على الملك ظاهرا
 لأن الظاهر الأصلح
 للملأ ستحقاق فلا
 بد من ثبوت ملكه
 بحججة لاستحقاق
 الشفعة فيسأل له
 عنه فان انكران
 يكون ملكا يقول
 للمدعى اقم البنية
 انها ملكك فان عجز
 عن البنية وطلب
 يمينه استخلف
 المشتري بالمعاقيم
 انه مالك الذي
 ذكره مما يشفع به لانه
 ادعى عليه حق الواقعية
 لزمه ثم هو في يد
 غيره فيختلف على
 العلم وهذا عند
 ابي يوسف^ـ كذا
 في التبيين - وعليه
 الفتووى كذا في
 السراحية - فان نكل
 او قامت للشفيع
 بنية او اقر المشتري

ant, who should now be interrogated respecting the property by reason of which the claim has been made. 'Is it the property of the pre-emptor or not?' for even though it were in his possession which is apparent evidence of ownership it is not sufficient for the claim of pre-emption must be established by direct proof. The defendant is accordingly to be asked regarding it, and if he denies the property to belong to the pre-emptor, the judge should say to the plaintiff, 'Produce proof that it is your property and if he (the plaintiff) fails to do so, and demands an oath from the vendee, the oath is to put in these words, 'By God I do not know that he is the proprietor of this house by reason of which he demands pre-emption.' The vendee is to swear on his knowledge of the fact because it is possible the property of the pre-emptor may be actually in some one else's possession. According to the *Tabayin* this is the view of Imām Abu Yusuf and according to the *Sirajiyya* the *Fatwa* accords with this view. However, if the vendee refuses to take the oath or the pre-emptor produces evidence or the vendee himself admits the fact then the pre-emptor's right to pre-empt

بذلك ثبت ملك الشفيع في الدار التي يشفع بها ويثبت السبب وبعد ذلك يسائل القاضي المدعى عليه فيقول هل اشتريت ام لا فان انكر الشراء قال للشفيع اقم البنية انه اشتري فان عجز عن اقامة البنية وطلب يمين المشتري استحلف بالله ما اشتري او بالله ما يسألك عليه في هذه الدار شفعة من الوجه الذي ذكره فهذا تحليف على الحاصل وهو قول ابي حنيفة^١ ومحمد^٢ والولعلي السبب وهو قول ابي يوسف^٣ فان نكل او قرأو قامت للشفيع بنية قضي بها لظهور الحق بالحججة كذا في التبيين - وفي الأجناس بين كيفية الشهادة فقال ينبغي ان يشهدوا ان هذا الدار التي بجوار الدار البيضاء ملك هذا الشفيع قبل ان يشتري

the property is fully established. Thereafter the *Kazi* is to ask the vendee "Have you purchased the property or not?" If he denies the purchase, the judge should ask the pre-emptor to produce proof of the fact of the sale, and if he is unable to do so and demands the oath from the vendee, the oath should be administered in these words, 'By God I have not purchased,' or 'By God, he has no right of pre-emption against me in this mansion.' This would be putting the oath as to the result, in conformity with the opinion of Imām Abu Ḥanīfa and Muḥammad while the other mode is to put it as to the cause, which is in accordance with the opinion of Abu Yusuf. If the vendee refuses to take the oath or he acknowledges the sale, or the pre-emptor adduces proof, then the decree is to be given in favour of the pre-emptor the right having been established by manifest proof. This is according to the *Tabyīn*. The 'Ajnās mentions the mode in which the evidence is to be taken. The witnesses should depose in the following manner. As regards the fact, of the pre-emptor's neighbourhood of the purchased mansion, it is required that the witness should testify thus, 'This property which is in

هذا المشتري هذه
الدار وهي له التي
هذه الساعة لا
نعلمها خرجت من
ملكة فلو قالا ان
هذه الدار لمن يحجار
لا يكفي ولو
شهدا ان الشفيع
اشترى هذه الدار
من قلان وهي
في يده او وعيها
منه فذلك يكفي
فلوار اه الشفيع
ان يخلف المشتري
فله ذلك كذا في
الذخيرة والمحبطة-

the vicinity of the purchased mansion, has been the property of the pre-emptor before the vendee had purchased that mansion, and that it belongs to him upto this time: and we do not know whether it has gone out of his ownership.' Hence if they should depose simply, 'This property belongs to this neighbour,' it would not be sufficient but if they should say that 'The pre-emptor bought this property from such and such person, and it is in his possession,' or that 'Such person gifted it to him' this testimony would be deemed sufficient. If the pre-emptor intends to demand an oath from the vendee, he can do so. This is according to the *Zakhīra* and the *Muḥīṭ*.

٦٣ - عن أبي
يوسف[ؑ] لو انها
رجل دار او اقام
بنية من هذه
الدار كانت في
يد ابيه مات وهي
في يده فانه يقتضي
له بالدار ولو بيعت
دار بعديها فانه
لا يستحق الشفاعة
حتى يقيم البنية
علي الملك دار
في يد رجل اقر
انها لآخر فبيعت

63. It is reported from Abu Yusuf that if a certain person brings a suit for a house and establishes by proof that 'This house was in the possession of his father,' and that it remained in his possession till his death, then the *Kāzī* should decree the house to him; meanwhile if a mansion by the side of this house is sold, then he is not entitled to pre-empt it prior to his establishing ownership in the house by reason of which he could demand pre-emption. A

بِحَجْنِبِهَا دَارٌ فَطَلَبَ
 الْمُقْرَرُ لَهُ الشَّفْعَةُ
 فَلَا شَفْعَةُ لَهُ
 حَتَّى يَقِيمَ الْبَنِيَّةَ
 إِنَّ الدَّارَ دَارَةً
 كَذَا فِي مُحْكِيَّتِ
 السُّرْخِسِيِّ - وَذَكَرَ
 الْخَصَافُ فِي اسْقَاطِ
 الشَّفْعَةِ إِنَّ الْبَايِعَ
 إِذَا أَقْرَأَ بِسَهْمٍ
 مِنَ الدَّارِ الْمُشَتَّرَةِ
 ثُمَّ بَاعَ مِنْهُ بِقِيَّةَ الدَّارِ
 غَالِبًا جَارٌ لَا يَسْتَحْقُ
 الشَّفْعَةَ، وَكَانَ أَبُو بَكْرٍ
 الْخَوَارِ (زَمِيْ) يَلْخَطُ
 الْخَصَافَ فِي هَذِهِ
 وَيَقْتَيْ بِهِ جُوبَ
 الشَّفْعَةِ لِلْجَارِ لَأَنَّ
 الشَّرِكَةَ مَا شَبَّثَتِ الْأَ
 بَاقِرَارَةَ كَذَا فِي
 الذَّخِيرَةِ - رَجَلَانِ
 وَرَثَا عَنْ أَبِيهِمَا
 أَجْمَةٌ وَاحِدٌ الْوَارَثَيْنِ
 بِعِينِهِ لَمْ يَعْلَمْ
 بِالْمِيرَاثِ وَلَمْ يَعْلَمْ
 بَانَ لَهُ مِنْهَا نَصِيبًا
 فَبَيْعَتِ أَجْمَةُ أُخْرَى
 بِلْجَوَارِ هَذِهِ الْأَ
 جْمَةُ فَلَمْ يَطْلَبْ
 هُوَ الشَّفْعَةُ فَلَمَا

house is in the possession of a person who acknowledges that it belongs to certain other person, and if a house beside this house is sold, and the person for whom the acknowledgment was made, demands pre-emption in the house, then he would not be entitled to do so until he produces proof that the house by reason of which he demands pre-emption is actually his own property. This is according to the *Muhīt* of *Sarakhsī*.

As regards the extinction of the right of pre-emption *Khisāf* mentions that if a vendor acknowledges a certain share in the house for a person, thereafter sells the remainder of the house to him, then the neighbour is not entitled to pre-emption; but Abu Bakr *Khwārazmī* disapproves, of this view of *Khisāf* and gives *Fatwa* to the effect that pre-emption arises in favour of the neighbour, *Shafī‘-i-jār*, for there is no other proof of partnership except the acknowledgment of the vendor. This is according to the *Zakhīra*. If two heirs inherit *Ajmah* (a forest) from their father, while one of them is not aware of the fact, that his father left him this forest and also has no knowledge that he has a share in it; and in the meanwhile

علم ان له فيها
نصيبا طلب الشفعة
في الا جمة المباعة
قالوا اتبطل شفعة
لان شرط تاكد
الشفعة طلب المراقبة
عند العلم بالبيع
فاذما لم يطلب
والجهل ليس بعد
لا تبقى له الشفعة
كذا في فتاوى
قاضي خان -

another forest beside this forest is sold,
and he does not demand pre-emption in
it, afterwards he learns that he has a
share in that forest by reason of which
he could demand pre-emption, therefore
now he demands pre-emption in the
forest sold, then according to the jurists
his right of pre-emption has already been
invalidated inasmuch as that the essential
condition for establishing pre-emption is
that *Talab-i-Muwāsabat* should be made at
the time of the information of sale, and
he has not made that demand and further
since such ignorance is not a sufficient
excuse, the right cannot exist. This
is according to the *Fatāwā-i-Qāzī Khān*.

الباب الرابع

في استحقاق الشفيع
كل المشتري أو العبده

٤٣ - رجل اشتري خمس منازل من
رجل واحد في سكة غيرنا فذة
بصفقة فاراد الشفيع
ان يأخذ منها
واحدا قالوا ان
طلب الشفعة بحكم
الشركة في الطريق لا
يأخذ البعض لانه
تفريق الصفة من غير
ضرر قوان اراد الشفعة
بحكم الجوار وجواره
في هذا المنزل الذي
يريد اخذة لغير كان
له ذلك كذا في فتاوى
قاضي خان - اذ اراد
الشفيع ان يأخذ
بعض المشتري دون
بعض فان لم يكن
متنازا عن البعض
بان اشتري دارا
واحدة فاراد الشفيع
ان يأخذ بعضها
بالشفعة دون البعض
وان يأخذ المجاذب

CHAPTER IV OF THE PRE-EMPTOR'S RIGHT TO THE WHOLE OR A PART OF THE PURCHASED PROPERTY

64. When a person purchases from another person, by a single bargain, five houses in a street in which there is no thoroughfare, and the pre-emptor desires to take one of them, then according to our jurists if his right of pre-emption is based on partnership in the way, he cannot pre-empt one of them for this would amount to the division of the bargain without any necessity for it, but if his right is based on neighbourhood, that is he happens to be the neighbour only to the house which he wishes to pre-empt, then he would be lawfully entitled to pre-empt it alone. This is according to the *Fatāwā-i-Qāzī Khān*. If a pre-emptor wishes to take a part of a purchased property and not the whole, while that part is not distinct or separate, as for instance, when the purchased property is a single mansion, and the pre-emptor desires to take that part which abuts on his own

الذي يلي الدار
دون الباقى ليس
له ذلك بلا خلاف
بيين أصحابنا ولكن
يأخذ الكل او يدع
لأنه لو اخذ البعض
دون البعض تفرق
الصفقة على المشتري
سواء اشتري واحد
من واحد او واحد
من اثنين او
اكثر حتى لو اراد
الشافعى ان يأخذ
نصيب احد البائعين
ليس له ذلك سواء
كان المشتري قبض
او لم يقبض في
ظاهر الرواية عن
اصحابنا وهو الصحيح
ولو اشتري رجال
من رجل دارا
فللشافعى ان يأخذ
نصيب احد المشتري
بيين في قولهم جميعا
سواء كان قبل القبض
او بعدة في ظاهر
الرواية لأن الصفقة
حصلت متفرقة
من الابتداء فلا
يكون اخذ البعض
تفريقاً سواء سمي
لكل واحد نصف
ثمن على حدة
او سمي الجملة شيئا
واحداً سواء كان

premises, without the remainder, then he cannot do so, and on this point there is no difference of opinion among our jurists; for if he were allowed to take a part only, that would be a division of the bargain as against the purchaser. The pre-emptor therefore must either pre-empt or leave the whole, whether the purchase be by one person from a single vendor or by a single vendee from two or more vendors; hence he cannot pre-empt the share of one of the two sellers and it is immaterial whether the purchaser has or has not taken possession of the property sold. This is the correct view. This is according to the *Zahīr Riwayat*. However if two vendees purchase some property from one vendor, the pre-emptor may take the share of one of them. This is the view according to all jurists, irrespective of the fact whether the purchasers have taken or have not taken possession of the property. This is according to the *Zahīr Riwayat* for here the bargain was separate from the beginning and the pre-emption of a distinct part is not dividing the bargain; and it is immaterial whether half the price was mentioned separately for each property or a single sale consideration was mentioned for both, or whether the person

المشتري عاقدا
لنفسه او لغيره في
الفصلين حتى لو
وكل رجال جمیعا
واحدا بالشراء
فاشتري الوکيل من
رجلین فجاء الشفیع
ليس له ان يأخذ
نصیب احد البايعین
بالشفعۃ ولو وكل
رجل رجلین فاشتریا
من واحد فللشفعیع
ان يأخذ ما اشتراه
احدا الوکیلین
وكذا لو كان الوکلاء
عشرة اشتروا الرجل
وحل فللشفعیع ان
يأخذ من واحد او من
اثنتين او من ثلاثة قال
محمد "وانما انظر
في هذا الى المشتري
ولا انظر الى المشتري
له وهو نظر صحيح
وان كان المشتري
بعضه ممتاز اعن
البعض بان اشتري
دارين صفة واحدة
فارد الشفیع ان يأخذ
احدا فيهما دون الا
خرى فان كان
شفیعا لهما جمیعا
فليس له ذلك
ولكن يأخذهما
جمیعا او يهد عههما
وهذا قول اصحابا
بنا الثالثة سواء

had contracted for himself or not. If two persons together were to appoint one person as an agent to purchase some property and the agent accordingly purchases from two persons, and the pre-emptor desires to make his claim, then he cannot take the share of one of the vendors only by his right of pre-emption; but if one person appoints two agents and these two agents purchase from one vendor then the pre-emptor may pre-empt the sale effected by one of the agents only. So also if ten agents purchase from one person, the pre-emptor may take from one, or from two, or from three. Imām Muḥammad has said that in all these cases regard is to be had to the actual purchaser, and not to the person on whose account the purchase has been made; and this is the correct view. If a part of the purchased property is separate and distinct from other part of it, as for instance, when two mansions are purchased by one bargain, the pre-emptor cannot take one of them without the other when he is entitled to pre-empt the both. Hence he must either take or leave the both; and this is the view of our three eminent jurists. It is immaterial whether the mansions are adjacent or separated

كانت الداران متلاصقتين او متفرقتين في مصر واحدا وفي مصررين وان كان الشفيع شفيعا واحد اهما دون الاخير وقع البيع صفقة واحدة فهل له ان يأخذ الكل بالشفعه روي عن ابي حنيفة انه ليس له ان يأخذ الا الشئ الذي يجاوره بالحصة وكذا روي عن محمد في الدارين المتلاصقتين اذا كان الشفيع جاراً لاحدا اهما انه ليس له الشفعه الا فيما يليه وكذا قال محمد في الترحthe المتلاصقة واحد منها يلي ارض انسان وليس بين الا قرحة طريق ولا نهر الا مسناة انه لاشفعه له الا في القراء الذي يليه خاصية وكذا لك في قريه اذا بيعت بدورها واراضيها ان لكل شفيع ان يأخذ القراء الذي يليه خاصة وروي

from each other, and whether they are situated in one or two different cities ; but if, he were the pre-emptor of one of the mansions only then according to Imām Abu Ḥanīfa he cannot pre-empt both, but that one only of which he is the actual *Shafī‘-i-jār*. And the same is the view of Imām Muḥammad also. As regards several fields which are adjacent to one another, and a certain piece of land belonging to different owner is adjacent to one of them and there is no common way or a canal in these fields except one *musnat* (a branched out small canal), then according to Imām Muḥammad the neighbour is entitled to pre-empt that field alone which is adjacent to his land. Similarly, in the case of villages if a certain village with all its effects (houses and fields) is sold, then a pre-emptor may pre-empt that field which is adjacent to his own and Hasan bin Ziyād has reported from Imām Abu Ḥanīfa that the pre-emptor is entitled to pre-empt the whole ; but Shaikh Kurkī says that it can be inferred from the report of Hasan bin Ziyād that Imām Abu Ḥanīfa was also of the same opinion as Muḥammad but afterwards he held that the whole should

الحسن عن أبي be treated as one mansion. This is
 حنيفة^٢ ان للشفيعي according to the *Badāyi'*.
 ان يأخذها لكل في
 ذلك كله بالشفعية
 قال الكترخى رواية
 الحسن تدل على
 ان قول أبي
 حنيفة^٢ كان
 مثل قول محمد^٢
 ثم رجع عن
 ذلك شجعل كالدار
 الواحدة هكذا في
 البدائع -

الباب الخامس

في الحكم بالشفعة والخصوصة فيها

٤٥ - ولا يلزم
الشفيع احضار
الثمن وقت الدعوى
بل يجوز له المنازعة
وان لم يحضر
الثمن الى مجلس
القاضي فاذا قضى
له بالشفعة له
احضار الثمن وهذه
رواية الا صد عن
محمد^ص ان القاضي
لا يقضى له بالشفعة
حتى يحضر الثمن
ثم اذا قضى له
قبل احضار الثمن
فللمشتري حق
حبس العقار عنه
حتى يدفع الثمن
اليه وينفذ القضاء
عند محمد^ص لانه
فصل مجهود
فيه ولو اخر دفع
الثمن بعد ماقال
ادفع الثمن اليه لا
تبطل بالاجماع كذا
في التبيين - كان اخذ
الدار من المشتري
فعهدته وضمان ماله
علي المشتري وان
اخدها من البائع

CHAPTER V

OF INSTITUTION OF THE PRE-EMPTOR'S CLAIM AND ITS EFFECTS

65. It is not incumbent on the pre-emptor to tender the price at the time of making his claim. Nay, he may lawfully contest the matter before the *Kāzī* without tendering the sale-consideration. But after the decree has been given, he must pay the amount. This is according to the *Asl*. Imām Muḥammad says that the *Kāzī* should not decree pre-emption to him unless he has tendered price, and if he has given the decree prior to the tender of the price, the vendee is entitled to refuse delivery of the property until the price is paid to him, and according to Imam Muhammed this view is subject to the order of the *Kāzī*. However, if the pre-emptor were to delay payment after he has been directed to do so, then according to all jurists, the decree is not to be cancelled. This is according to the *Tabyīn*. If the pre-emptor takes the property from the vendee, then the contract and security of the sale-consideration rests upon vendee. And if he takes it from the vendor, then the contract and

و دفع الثمن اليه
فعهدته وضمان ماله
علي البائع عندناو
دوى ابو سليمان عن
ابي يوسف^ح ان
المشتري كان نقد
الثمن ولم يقبض
الدار حتى قضى
القاضي للشفيع
بحضر تهمها فاذ
يقبض الدار من
البائع وينقد الثمن
للمشتري وعهدته
علي المشتري وان
كان لم ينقد الثمن
دفع الشفيع الثمن
الي البائع وعهدته
علي البائع
فلو ان الشفيع
في هذه الصورة
وجد بالدار عيبا
فردها علي البائع
او علي المشتري
بقضاء القاضي
فإن أراد المشتري
أن يأخذها
بشرايه واراد
البائع ان يردها
علي المشتري
بحكم ذلك الشراء
فالمشتري بال الخيار
إن شاء أخذها وإن
شاء تركها فان أخذ
الشفيع الدار من
المشتري واراد ان

its responsibilities are on the vendor. Abu Sulaimān reports from Abu Yusuf that if the vendee has paid the price and has not yet obtained possession of the property and the Kazi decrees pre-emption in favour of the pre-emptor in their presence, then he (the pre-emptor) should get possession of the property from the vendor and pay the price to the vendee, and the contract and its responsibilities will be on vendee, but if he (the vendee) has not paid the price then the pre-emptor should pay the price to the vendor, and the contract and its responsibilities will be upon the vendor. Thus if the pre-emptor finds any defects in the property and returns it either to the vendor or to the vendee by the order of the Court, thereafter if the vendee intends to purchase it at its previous price, and the vendor is also willing, then the vendee has an option to take it or leave it. If the pre-emptor takes the property from the vendee and intends to make a contract with him as a security, then he can do so. He should mention in the contract deed the fact that the vendee purchased the property first and the manner in which it was pre-empted. Thereafter the pre-emptor should take the deed of

يكتب كتابا على المشتري ليكون وثيقة للشفيع على المشتري له ذلك ويحكي في الكتاب شراء المشتري اولا ثم يرتب عليه الاخذ بالشفعة وياخذ الشفيع من المشتري كتاب شرائط الذي كتب على باعه وان ابي المشتري ان يدفع اليه ذلك فله ذلك ولكن ينبغي للشفيع ان يحتاط لنفسه فيشهدن قوما علي تسليم المشتري الدارالية بالشفعة وان كان الشفيع اخذ الدار من البائع يكتب كتابا على البائع نحو ما يكتب لواحد من المشتري ويكتب في هذا الكتاب اقرار المشتري انه سلم جميع مافي هذا الكتاب واجازة واقر انه لاحق له في هذه الدار ولدي ثمنها كدافي - المحيط -

contract, drawn up by the vendor in favour of the vendee and but if the vendee refuses to hand it over to him then he can do so; but it is necessary for the pre-emptor that he should protect himself by invoking witnesses on the fact that the vendee has delivered possession of the property to him on account of his right of pre-emption. And if the pre-emptor takes the property from the vendor, he may draw a similar document stating in the deed the acknowledgement of the vendee to the effect that he has surrendered his right, had acquiesced or acknowledged that he has no right of any kind to the property and no demand as regards its sale-consideration. This is according to the *Muhīt*.

٦٦ - وان شاء
كتب الكتاب عليهم
بتسلیم الدار بالشفعة
اليه وقبض البائع
الثمن برضاه وضمان
البائع الدرك كذا
في المبسوط -

٦٧ - واداً قضي
القاضي للشفيع
او سلم المشتري
تشبت بنبيهما احکام
البيع من خيار
رؤبة وخيار عيب
والرجوع بالثمن
عند الا ستحقاق
اّلا ان الشفيع لا
يرجع بضمان الغرور
حتى لو بني في
الدار المشفوعة ثم
استحققت الدار
وامر بتفصيل البناء
كان له ان يرجع
بالثمن على من
اخذ منه الدار
بالشفعة ولا يرجع
بقيمة البناء في
المشهور من الرواية
وعن ابي يوسف

66. If the pre-emptor wishes he may draw up a document thus that the mansion has been delivered to him in pre-emption and the vendor has taken its price with the consent of the vendee, and also that the vendor is *zimān-ud-dark* responsible for the *dark* any defect creeping in the property. This is according to the *Mabsūt*.

67. When the Kazi has passed a decree in favour of the pre-emptor, or the vendee has delivered the property, then all the legal effects of sale are established, such as the options of inspection and defect, and lien for the price in the event a third person establishes his title to that property, but the pre-emptor is himself responsible for any loss sustained in consequence of his own deception. That is, if he were to erect a building on the land pre-empted and thereafter a third person's title is established in the land and consequently an order is given for the demolition of the building, then he can recover only the sale-consideration from the person from whom he took the property and he cannot recover the value of the new building. This is the accepted view, but Abu Yusuf is of opinion

انه يرجع والمشتري
يرجع كذا في التأثار
خانية وادفع الشراء
بثمان موجل الى
سنة مثلا فحضر
الشقيق فطلب الشفعة
واراد اخذها الى
ذلك الاجل غليس
له ذلك الا برضاء
الما خود منه ويقول
القاضي له اذا لم
يرض الما خود منه
اما تتقى الشمن حالا
او ت慈悲 حتى يحل
الاجل فان نقد
الشمن حالا وكان
الأخذ من البائع
سقط الشمن عن
المشتري وان نقد
الشمن حالا وكان
الأخذ من المشتري
يبقى الاجل في حق
المشتري على حاله
حتى لا يكون للبائع
ولاية مطالبة المشتري
قبل محل الاجل
وان صبر حتى حل
الاجل فهو على
شفعته هذا اذا كان
الاجل معلوما واما
اذا كان مجهولا
نحو الحصاد
والدبابس واشباه ذلك
فقال الشقيق انا
اعجل الشمن واحدها

that he can recover the value of the buildings also, however, in similar circumstances the vendee is always entitled, to the cost of buildings. This is according to the *Tatār Khāniyya*. And if the sale has taken place for a deferred price, as, for instance, on credit for one year, then the pre-emptor is not entitled to the benefit of the credit, except with the consent of the persons involved and if that person is not willing then the Kazi should say to the pre-emptor, 'pay down the price at once or wait for pre-emption till the expiration of the period of credit.' If the pre-emptor makes the payment and takes the property from the vendor, then the vendee is not responsible for the price; but if he takes it from the vendee, then the period stipulated for deferred payment remains as it was in favour of the vendee, and the vendor has no power to demand the price from the vendee before the expiration of the term. If the pre-emptor waits till the expiration of the time of payment, then he is entitled to his right of pre-emption, provided the period was fixed and known for if it were an invalid term, as, for instance, 'till harvest' and the pre-emptor is prepared to pay the price

لَمْ يَكُنْ لَهُ ذَلِكَ
كَذَا فِي الْمُحِيطِ
وَالْذَّخِيرَةِ وَالْفَتَاوَىِ
الْعَتَابِيَّةِ - وَلِوَبَاعِ الْيَ
أَجْلٌ فَاسِدٌ فَيُجْعَلُ
الْمُشْتَرِيُّ التَّسْنِ جَازَ
الْبَيْعَ وَتَبْثِيتُ الشَّفْعَةِ
وَكَذَا الْأَرْضُ تَبَاعُ
وَفِيهَا زَرْعٌ الْمَرَاجِعُ
بَطَلَتْ عَنْدَ الْبَيْعِ
وَغَيْرُ الْمُجْرَهِ رَوِيَ فِي
الْخَيَارِ الْمُؤَبِّدِ وَ
الْأَجْلِ إِلَيِّ الْعَطَاءِ
جَازَ أَخْذَهُ بِالشَّفْعَةِ
وَإِنْ لَمْ يَطْلُبْ فِي
الْحَالِ بَطَلَتْ كَذَا
فِي التَّاقَارِ خَانِيَّةَ -

immediately and take the subject of sale, then he cannot do so.¹ The *Muīḥt*, the *Zakhira* and the *Fatāwā-i-Itābiyya* express the same view. If the vendee purchases some property and stipulates a *fāsid*, invalid, period for payment of the price but pays it down immediately, then the sale becomes valid, and the right of pre-emption arises. And similarly if the land is sold when crops are standing, then the pre-emptor must demand pre-emption at the time of sale, otherwise his right will be invalidated. And according to the *Mujarrad* in the case of sale, subject to option, it is lawful to take it in pre-emption immediately; and if the pre-emptor does not demand pre-emption his right of pre-emption is invalidated. This is according to the *Tātār Khāniyya*.

٦٨ - الشَّفْعَوِيُّ اذَا
 طَلَبَ الشَّفْعَةَ بِالْجَوَارِ
 فَالْقَاضِي يَسَّأَلُهُ هَلْ
 تَرِي الشَّفْعَةَ بِالْجَوَارِ امْ
 لَا فَانْ قَالَ نَعَمْ يَقْضِي
 بِالشَّفْعَةِ وَالاً فَلَا
 كَذَا فِي السَّرَاجِيَّةِ -
 رَجُلٌ اشْتَرَى مِنْ
 آخِرِ دَارَى بِالْفَلَفَ
 مَرْهُومٍ وَبَاعَهَا

68. If a person who belongs to the *shafī'* school demands pre-emption basing his right on the *jawār* (neighbourhood), the judge should put him this question "Do you believe in *Shufa' bil jawār* or not?" and if he answers affirmatively, the judge will decree pre-emption, otherwise not. This is according to the *Sirājiyya*. A person

¹ The reason here being that the sale itself is invalid.

من اخر بالفی
درهم و سلمها ثم
حضر الشفیع و
اراد ان يأخذ الدار
بالبیع الاول قال ابو
یوسف [ؑ] يا خذها
من الذي هي في
بیده ويدفع اليه
الف درهم ويقال
له اطلب صاحبك
الذي باعك فخذ منه
الفا اخری وروی
الحسن بن زیاد
عن ابی حنیفة [ؓ]
اذا حضر الشفیع
وقد باع المشتری
الدار وسلمهها وغاب
واراد وان يأخذها
بالبیع الاول فلا
خصومة بینه وبين
المشتري الآخر
فالحاصل ان الشفیع
او اراد اخذها
بالبیع الاول تشترط
حضرۃ المشتري الاول
عند ابی حنیفة [ؓ]
وهو قول محمد [ؐ]
وفی قول ابی یوسف [ؑ]
لا تشترط حضرۃ
وان اراد اخذها
بالبیع الثاني لا

purchases a house from another person for 1000 *dirhams* and sells it to another person for 2000 *dirhams* transferring possession of it to him at the same time. Thereafter the pre-emptor appears and intends to pre-empt the house for the price of the first sale, that is, 1000 *dirhams* then Abu Yusuf holds that he can pre-empt it from the second vendee who has possession of it for the same price, and the second vendee should recover 1000 *dirhams* the remainder of the price which he has paid, from his own vendor. Ḥasan ibn Ziyad relates from Imām Abu Hanifa that if the pre-emptor appears while the vendee has already sold and delivered possession of it, and is also absent from the place, and the pre-emptor intends to pre-empt the property on the first sale, then there exists no cause for litigation between him and the second vendee, that is, if the pre-emptor desires to take the house by the first sale according to Imām Abu Hanifa and Muḥammad the presence of the first vendee is a necessary condition. But Imām Abu Yusuf holds that it is not a binding condition. However, if the pre-emptor pre-empts the second sale, then without doubt it is not necessary

تشترط حضرة المشتري الاول بلا خلاف كذا في المحيط - فان قال الشفيع ان لم اجي بالشمن الي ثلاثة ايام فانا بري من الشفعة فلم يجبي بالشمن الي ذلك الوقت ذكر ابن رستم عن محمد انه تبطل شفعته وقال المشائخ² لا تبطل شفعته وهو الصحيح ولو ان الشفيع احضر الدنانيرو الشمن دراهم او علي العكس اختلقو فيه و الصحيح انه لا تبطل كذا في فتاوى قاضي خان - وفي الفتاوى العتابية ولو ساله المشتري ان يوخر الخصومة الى كذا وهو على خصومته فاجابه فهو كذلك وفي المتنقى بشرعن أبي يوسف³ ان قول الشفيع لاحق

that the first vendee should be present and made a party. This is according to the *Muhīt*. And if the pre-emptor says "If I do not pay the price within three days, I shall have no right of pre-emption" and then if he does not tender the price within the stated period, Ibn Rustam reports from Imām Muḥammad that his right of pre-emption is invalidated, but some jurists hold the opposite view and which is correct. If the pre-emptor offers *dinārs*¹ whereas the price was fixed in *dirhams* or produces *dirhams* whereas the price was fixed in *dinārs*, the jurists differ as to the effect, but the correct opinion is that in such cases the right of pre-emption is not invalidated. This is according to the *Fatāwā-i-Kāzī-Khān*. It is mentioned in the *Fatāwā-i-Itābiyya* that if the vendee asks the pre-emptor to postpone the litigation till a definite period and the pre-emptor acquiesces nevertheless the right continues. It is mentioned in the *Muntaqā* on report by Bashr from Abu Yusuf that such a statement of the pre-emptor, viz., "I have

¹ *Dinar* is a gold coin of much higher value than a *dirham* which is a silver coin now obsolete roughly equivalent to the French franc.

لي عند فلان براحة
من الشفعة كذا فني
الثالث رخانية -

٦٩ - رجل في
يده دار جاء رجل
ادعى ان صاحب
اليد اشتري الدار
من فلان و انا
شفيعها و اقام على
ذلك بنية و اقام
صاحب اليد بنية
ان فلانا اودعها
اياد يقضى القاضى
للشفيع بالشفعة
لان صاحب اليد
انتصب خصما
بدعوى الفعل وهو
شراءه ولو كان
الشفيع لم يدع الشراء
على صاحب اليد
انما ادعاة على رجل
وصورته ان يقول
لصاحب اليد ان
هذا الرجل اشار
الى غير صاحب اليد
اشترى هذه الدار
من فلان بكتدا و
نقد الشمن و انا
شفيعها و اقام على
ذلك بنيته و اقام
صاحب اليد بنية
ان فلانا اودعها
ياد فلا خصومة
بينهما حتى يحضر
الغائب لان صاحب

no right against that person " amounts to the waiver of his right of pre-emption. This is according to the *Tatār Khāniyya*.

69. An owner is in possession of a certain house. Another person says that this owner has purchased the house from some other person and claims that he is the pre-emptor of that house. He also produces proof in support of his statement. The owner who is in possession of the house also produces evidence to the effect that the house has been entrusted to him by some other person. Then the Kazi should decree pre-emption to the claimant, because the person in possession of the house is considered as the otherparty to the litigation but if the claimant does not sue him for the purchase of the house but sued some other person, for example, if he says to the person who is in possession of the house, that a certain stranger (who is not in possession of the house) has purchased it for so much, and that he claims to be its pre-emptor, and tenders evidence while the person in possession establishes that such and such person has entrusted it to him, then there exists no cause of litigation between both of them until the third party presents himself, because here the

اليد هرنا انتصب
خصوصا بحكم ظاهر
اليد لا بد عوی الفعل
كذا في المحيط
اشترى ١٥ دارا
بالجياد و نقد
الربیوف او النبهرجة
أخذها الشفیع
بالجياد كذا في
السراجیة- ولو رضي
البایع باخذ الربیوف
عن الجیاد كان
للمشتري ان يرجع
علي الشفیع بالجياد-
كذا في المضمرات-

person in possession has been made a party simply because of his possession. This is according to the *Muhit*. If a person buys a house for genuine *dirhams* but paid counterfeit *dirhams* then the pre-emptor is only entitled to pre-empt the property for genuine *dirhams*. This is according to the *Sirajiyah*. If the vendor agrees to take counterfeit *dirhams* in lieu of genuine *dirhams*, then also the vendee has a right to demand genuine *dirhams* from the pre-emptor. This is according to the *Muzmarat*.

الباب السادس

في الدار اذا ابعت
ولها شفعة

٧٠ - يجحب ان
يعلم بان الشفعة
اذا اجتمعوا لحق
كل واحد قبل
الاستيفاء والقضاء
ثابت في جميع
الدار حتى انه
اذا كان للدار
شفعيان سلم احد
هما الشفعة قبل
الأخذ وقبل القضاء
كان للآخر ان ياخذ
خذ الكل و بعد
الاستيفاء و بعد
القضاء يبطل حق
كل واحد منهما
عما قضي لصاحبه
حتى اذا كان للدار
شفعيان و قضي
القاضي بالدار يعنيهما
ثم سلم احد هما
ذصبيه لم يكن
للآخر ان ياخذ
الجميع و اذا كان
بعض الشفعة القوى
من البعض قضي
القاضي بالشفعة
للقوى بطل حق
الضعيف حتى انه
اذا اجتمع الشريك
والجار سلم الشريك

CHAPTER VI

OF THE SALE IN WHICH SEVERAL PERSONS
ARE ENTITLED TO PRE-EMPT

70. It should be known that when there are several persons and all of them have the right of pre-emption in a mansion, then each one of them, before perfection of his right or decree in his favour, has a right in the whole mansion and if one of them gives up his right before taking possession and before decree, then the others may take the whole. But after perfection of his right, or after decree, the right of each one is that which has been assigned, or decreed in the capacity of a co-pre-emptor, that is, if there are two pre-emptors to a mansion, and the Kazi decreed pre-emption between them, now one of them surrenders his share, the other cannot take the whole. If some of the pre-emptors have superior right to others, then the Kazi will decree pre-emption to them, and the right of the inferior pre-emptors is invalidated, e.g., if *shafi'-i-shaaik* and *shafi'-i-jār* together demand pre-emption, and the *shafi'-i-sharik* surrenders pre-emption before the decree in his favour, then the

الشفعه قبل القضاء
له كان للجبار ان
يأخذها بالشفعه
ولو قضى القاضي
بالمدار للشريك ثم
سلم الشريك الشفعه
فلا شفعه للجبار
كذا في الذخيرة -
واذا كان
احد الشفيعين
غائباً كان للحاضر ان
يأخذ جميع الدار
واذا اراد ان
يأخذ النصف ورضي
المشتري بذلك فله
ذلك وان قال
المشتري لا اعطيك
الا النصف كان له
ان يأخذ الكل
كذا في المسوط -
وان كان
الحاضر قال في
غيبة الغائب انا
اخذ النصف او
الثلث وهو مقدار
حقه لم يكن له
الا ان يأخذ الكل
او يدع كذا في
السراج الوهاج -
واذا قضى
القاضي للحاضر
بكل الدار ثم
حضر آخر وقضى
له بالنصف ثم

shafī‘-i-jār is entitled to pre-empt the property, and if the Court had decreed the mansion to the *sharīk* thereafter he surrenders his right, then the *shafī‘-i-jār*, has no right of pre-emption to the mansion. This is according to the *Zakhira*. If one of the two pre-emptors is absent, then the present pre-emptor is entitled to take the whole mansion and if he desires to take half of it and the vendee agrees to it, he could do so, but if the vendee says 'No, I shall not give you the whole but the half only,' then nevertheless he has the right to take the whole. This is according to the *Mabsut*. And if the present pre-emptor says in the absence of the other pre-emptor 'I shall take half, or one-third which is my actual share only,' then he is not entitled to do so, he must either take the whole or give up his right. This is according to the *Sirāj-al-Wahhāj*. And if after the Kazi has decreed the whole house to the present pre-emptor, thereafter another pre-emptor appears to whom he decrees one-half, thereafter the third pre-emptor comes forward to whom he also decrees one-third of what the two previous pre-emptors had received so that their shares become

حضر آخر قضى
له بثلث مافي
يد كل واحد منها
حتى يصير مساويا
لهم فان قال الذي
قضى له بكل الدار
أولا للثاني أنا
اسلم لك الكل
فما ان تأخذ الكل
او تدع فليس له
ذلك وللثاني ان
يأخذ النصف كذا
في المحيط - ولو
حضر واحد من
الشفعاء أولا
واثبت شفعته
فان القاضي يقضي
له بجميعها ثم اذا
حضر شفيع آخر
واثبت شفعته فان
القاضي ينظر ان
كان الثاني شفيعا
مثل الاول فانه يقضى
له بنصف الدار
وان كان الثاني
اولى كما اذا كان
الاول جارا والثاني
خلطان فان القاضي
يبطل شفعة الاول
ويقضي الجميع الدار
للثاني وان كان
الثاني دون الاول
فانه لا يقضي له
بشيء كذا في
السراج الوعاج -

equal, now if the pre-emptor to whom the whole of the house was decreed, says to the second pre-emptor to whom the half was decreed "I resign the whole in your favour, either take the whole or give up the whole," he cannot do so, and the second is entitled to take the half only. This is according to the *Muhīt*. If one of the several pre-emptors appear first and establishes his right and the Kazi decrees the whole house in his favour, thereafter another pre-emptor appears, then the Kazi, if he is of the opinion that both of them have equal rights will decree half of the property to him also, but if he is of opinion that the second one has a superior right, e.g., if the first pre-emptor happens to be a *Shāfi'i-Jār* and the second *Shāfi'i-Khalīt*, the Kazi will invalidate the right of the first and decree the whole to the second, and if the second has an inferior right to the first, then he shall not pass any decree at all. This is according to the *Siraj-āl-Wahhāj*.

٧١ - ولو ان
 رجلا اشتري دارا
 وهو شفيعها ثم جاءه
 شفيع مثليه قضي
 القاضي بنصفها وان
 جاءه شفيع آخر
 اولى منه فان القاضي
 يقضى له بمجمיע
 الدار وان جاءه
 شفيع دونه فلا شفعة
 له هكذا في شرح
 الطحاوي - ولو قضي
 بالدار للحاضر
 ثم وجد بها عيبا
 فردها ثم قدم الغائب
 فليس له ان يأخذ
 بالبيع الاول الا
 نصف الدار سواء
 كان الرد بالعيوب
 بقضاء له او بغير
 قضاء وسواء كان قبل
 القبض او بعده ولو
 اراد الغائب ان
 يأخذ كل الدار
 بالشفعة بره الحاضر
 بالعيوب ويدع البيع
 الاول ينظر ان كان
 الرد بغير قضاء
 فله ذلك لأن الرد
 بغير قضاء بيع

71. If a pre-emptor purchases a house and another co-pre-emptor who has an equal right of pre-emption to the house appears, then the Kazi will decree in his favour half of the house. And if afterwards another person who has a better right appears and prefers his claim, then the Kazi will decree the whole house to him, and if a person having an inferior right appears, then he is not entitled to pre-emption. This is according to the *Sharkh-al-Tahāwī*. If after the house has been decreed to the pre-emptor he returned it to the vendor on account of defect, and another pre-emptor who was absent appears, he can pre-empt only half of the house by the first sale whether the house was returned on account of defect with the order of the Court or without it or whether it was before or after taking possession of it. And if the absentee pre-emptor desires to take the whole of the house in pre-emption by reason of the fact that the first pre-emptor had returned it on account of defect, and he also desires to give up his right on the first sale, then it is to be considered whether the return was without the order of the Court, and if so, he can pre-empt it,

مطلق فكان بيعاً
جديداً في حق
الشفعه فيأخذ الكل
بالشفعه كما يأخذ
بليبيع البيت إذا هكذا
ذكر محمد² واطلق
الجواب ولم يفصل
بينهما اذا كان
الرد بالعيوب قبل
القبض او بعده
من مشائخنا من
قال ما ذكر من
الجواب محمول
على ما بعد القبض
لان الرد قبل القبض
بغير قضاء بيع جديداً
وبيع العقار قبل
القبض لا يجوز على
اصله و اذما يستقيم
اطلاق الجواب على
اصل ابي حنيفة و ابي
يوسف² ومنهم من
قال يستقيم على
مذهب الكل و ان
كان بقضاء فليس
له ان يأخذ لانه
فسخ مطلق ورفع
العقد من الاصل
كانه لم يكن والأخذ
بالشفعه يختص

because the return without the order of the Court is considered as an absolute sale and with reference to his right of pre-emption, it will be a new sale, therefore he can take the whole of the house in pre-emption. Imām Muhammad has stated the same view but not in detail as to what should be the law if before or after possession of the property the return takes place on account of defect. Our jurists hold that what he has said applies to the fact when the property after it was taken possession of was returned on account of defect, because the return after taking possession and without the order of the Court is considered as a new sale, and further the sale of any property before its possession is taken is not lawful. However, this view is correct according to Imām Abu Hanifa and Imām Abu Yusuf and according to our jurists. And if the return was made after the order of the Court the pre-emptor cannot take it because it amounts to the cancellation of the sale as if the transaction had never taken place at all, while the right of pre-emption is based on validity of sale itself. However, if the pre-emptor being aware of the defect surrendered the right

بالبيع ولو اطمع
 الحاضر على عيب
 قبل ان يقضي له
 بالشفعه فسلم الشفعة
 ثم قدم الغائب
 فان شاء اخذ الكل
 وان شاء ترك ولو
 رد الحاضر الدار
 بالعيب بعد ما قضي
 له بالشفعه ثم حضر
 شفيعان اخذ اثنين
 الدار بالشفعه والحكم
 في الا ثنتين والثالث
 سواء بيسقط حق
 الغائب بقدر حصة
 الحاضر ولو كان
 الشفيع الحاضر
 اشتري الدار من
 المشتري ثم حضر
 الغائب فان شاء
 اخذ كل الدار
 وبالبيع الاول وان
 شاء اخذ كلها
 وبالبيع الثاني ولو
 كان المشتري الاول
 شفيع الدار فاشترى
 الشفيع الحاضر منه
 ثم قدم الغائب
 فان شاء اخذ
 نصف الدار وبالبيع
 الاول لأن المشتري
 الاول لم يثبت له
 حق الشراء قبل
 الشراء حتى يكون
 بشرائه معرضا عنه
 فإذا باعه من الشفيع

before the decree of pre-emption was made in his favour and thereafter the absentee appears, then if he desires he may take the whole of the house or give up his right. And if the pre-emptor had returned the house on account of defect after the decree of pre-emption was made in his favour, and then two other pre-emptors appear, they both can take two-thirds of the house in pre-emption. The same rule applies whether there are two or three pre-emptors, that is, the right of the absentees is determined with reference to their numbers. If a pre-emptor did not pre-empt the property but purchased it from the vendee, thereafter an absentee pre-emptor appears, then he can, if he desires, take the whole house by the first sale or by the second sale. However if the first vendee happens to be the pre-emptor of the house also and then another pre-emptor who is present purchases it from him, and afterwards an absentee pre-emptor appears, then he can, if he desires, take half of the house by the first sale, because the first vendee had not acquired ownership before he had himself purchased the property, hence when he sells the house to the other pre-emptor,

الحاضر لم يثبت للغائب الا مقدار ما كان بحقه بالمراجعة مع الاول وهو النصف لأن السبب عند البيع الاول او جب الشفعة للكل في كل الدار وقد بطل حق الشفيع الحاضر بالشراء لكون الشراء دليل الاعراض فبقي حق المشتري الاول والغائب في كل الدار فيقسم بينهما فيأخذ الغائب نصف الدار بالبيع الاول وإن شاء اخذ الكل بالبيع الثاني لأن السبب عند العقد الثاني او جب الشفيع حق الشفعة ثم بطل حق الشفيع الحاضر عند العقد الاول ولم يتعلق باقديمه على الشراء الثاني لاعراضه فكان للغائب ان يأخذ كل الدار بالعقد الثاني ولو كان المشتري الاول اجنبيا اشتراها باتفاقها من اجنبى بالفين فحضر الشفيع فالشفيع

then nothing is established for the absentee except the extent of the share to which he is entitled, as between him and the first vendee and that share is half, because at the first sale *Shuf'a* appertains to every one of the pre-emptors in the whole of the house, and the right of the pre-emptor who was present has been invalidated on account of his own purchase since the fact of purchase shows that he was disinclined to pre-empt it, and hence the right of the first vendee and the absentee remain in the whole of the property and so the house would be divided between them equally and the absentee would take half of the house by the first sale, and if he desires, he can take the whole of it by the second sale because at the second sale the right of pre-emption of the present pre-emptor is considered to have been waived, and therefore the absentee is entitled to take the whole house on the second sale. And if the first vendee is a stranger and he has bought the house for 1000 *dirhams* and sells it to another stranger for 2000 *dirhams*, thereafter the pre-emptor appears, then the pre-emptor has the option, either to take the house by the first sale, or by the second sale for the

بالخيار ان شاء اخذ باليبيع الاول وان شاء اخذ باليبيع الثاني لوجود سبب الاستحقاق وشرطة عند كل واحد من البيعين شأن اخذ باليبيع الاول سلم الشن الي المشتري الاول والعهدة عليه وينفسح البيع الثاني و يسترد المشتري الثاني الشن من الاول و ان اخذ باليبيع الثاني تم البيعان جميعاً والعهدة علي الثاني غير انه ان وجد المشتري الثاني والدار في يده فله ان يأخذ باليبيع الثاني سواء كان المشتري الاول حاضراً او غائباً وان اراد ان يأخذ باليبيع الاول فليس له ذلك حتى يحضر المشتري الثاني هكذا ذكر القاضي الامام الا سبيح جابر في شرحه المختصر الطحاوي ولم يحك خلا فاود ذكر الكرخي ان هذا قول ابي حنيفة و محمد

cause and condition of establishing the right of pre-emption are in existence at the time of both of the sale transactions, then if he pre-empts the first sale, he shall deliver the price to the first vendee and the contract is with him and the second sale would be annulled and the second vendee would become entitled to recover the price from the first vendee; but if he pre-empts the second sale, then both of the transactions stand valid and the contract is with the second vendee and if the pre-emptor finds that the second vendee has the possession of the house, then he may pre-empt the house by the second sale, no matter whether the first vendee is present or absent, and if he desires to take it by the first sale, he cannot do so until the first vendee presents himself. The above view is stated without difference of opinion by Kazi Imām Isbjābī in his work the *Shark-al-Mukhtasar-ul-Tuhāwī*. Karkhī says that this is the view of Imām Abu Hanifa and Muḥammad also. And if in this case the vendee had sold half of the house and not the whole of it, there after the pre-emptor came and desired to pre-empt the first sale, then he is entitled to take the whole of it by

ولو كان المشتري
باع نصف الدار
ولم يبع جميعها
فبحاجة الشفيع وراثه
ان يأخذ بالبيع
اخذ جميع الدار
ويبطل البيع في
النصف الثاني من
المشتري وان اراد
ان يأخذ النصف
بالبيع الثاني فله
ذلك ولو كان
المشتري لم يبع
الدار ولكنها وذهبها
من رجل او
تصدق بها على
رجل وقبضها الموهوب
له او المتصدق
عليه ثم حضر
الشفيع والمشتري
والموهوب له حاضر
اخذها الشفيع
باالبيع لا بالهبة
ولا بد من حضرة
المشتري حتى لو
حضر الشفيع ووجد
الموهوب له فلا
خصومة معه حتى
يحدد المشتري ثم
يأخذها بالبيع الاول
والثمن للمشتري
بطلت الهبة كذا
ذكرة القاضي من
غير خلاف ولو
ذهب المشتري نصف
الدار مقسماً ما

the first sale and the subsequent sale made by the first vendee would thereby be invalidated, however if he desires to take half of the house by the second sale, he can do that also. If the vendee had not sold the house but made a gift of it to some person or had given it away in *sadqah* charity to some person, and the donee or the person to whom the house was given in *sadqah* has obtained possession of the same, thereafter the pre-emptor appears, and if the vendee and the donee are present, then he can preempt the house by the first sale and not by the *hiba*, and the presence of the vendee is absolutely necessary, so that if the pre-emptor finds only the donee, then he cannot litigate against him, unless the vendee comes, for then he would take the house on the first sale and the price would be paid to the vendee, and the gift would be invalidated. Kazi Imām Isbjābī has also stated this view without difference of opinion. If the vendee makes a gift of half of the house after dividing it, and delivers it to the donee, thereafter the pre-emptor appears and desires to take the remaining half of the house for half the original price, he cannot do so ; but he can take

وسلمته الي الموهوب
له ثم حضر الشفيع
فأراد ان يأخذ
النصف الباقي بنصف
الثمن ليس له ذلك
ولكنه يأخذ جميع
الدار بجميع الثمن
او يدع وبطلت
المهبة وكان الثمن
كله للمشتري لا
الموهوب له كذا
في البدائع -

٧٢ - رجل اشتري
دارا ولها شفيعان
احد هما غائب وطلب
الحاضر الشفعة
فقضى القاضي له
ثم جاء الشفيع
الثاني فان الشفيع
الثاني يطلب الشفعة
من الشفيع الحاضر
الذى قضى له القاضي
لا من المشتري
هذا اذا طلب
الشفيع الحاضر
جبيع الدار بالشفعة
فإن طلب النصف
على ظن انه
لا يستحق الا
النصف بطلت شفعته

the whole of the house for the full price or give up his claim. If he pre-empts the whole, then the gift will be nullified, and the whole of the price will be paid to the vendee and not to the donee. This is according to the *Bidāya*.

72. A person buys a house which has two pre-emptors, one of whom is absent. The present pre-emptor demands pre-emption and the Kazi decrees the same to him, thereafter the second pre-emptor appears, then he should demand pre-emption from the pre-emptor to whom the Court had decreed pre-emption and not from the vendee, and this is so when he has pre-empted the whole house, for if he had demanded pre-emption in the half only then his right was invalidated. And similarly if both of the pre-emptors are present, and then each one of them demands pre-emption in the half, then both of them will forfeit their right of pre-emption, because each one of them for not having demanded pre-

وَكُذا لَوْ كَا نَا
 حاضرِينْ فَطَلَبَ
 كُلَّ وَاحِدٍ مِنْهُمَا
 الشُّفَعَةُ فِي النَّصْفِ
 بَطَلَتْ شُفَعَتِهِمَا
 لَأَنْ كُلَّ وَاحِدٍ
 مِنْهُمَا لَمْ يَطْلُبْ
 الْكُلَّ بَطَلَتْ شُفَعَتِهِ
 فِي النَّصْفِ الَّذِي
 لَمْ يَطْلُبْ فَإِذَا بَطَلَتْ
 شُفَعَتِهِ فِي النَّصْفِ
 تَبَطَّلُ فِي الْكُلِّ كَذَا ثِي
 فتاوى قاضي خان -

emption in the whole loses his right in the half in which he has not demanded pre-emption, and when his right in the half is invalidated, it is invalidated in the whole. This is according to the *Fatāwā-i-Kazi Khān*.

الباب السابعة

في انكار المشتري
جوار الشفيع وما
يتصل به

٧٣ - وفي الاجناس
بين كيفية الشهادة
فقال ينبغي ان
يشهدوا ان هذه
الدار التي بجوار
الدار المباعة ملك
هذا الشفيع قبل
ان يشتري هذه
المشتري هذه الدار
وهي له الى هذه
الساعة لا نعلمها
خرجت عن ملكه
فلو قال ان هذه
الدار لهذا الجلار
لا يكفي لو شهدوا
ان الشفيع كان
اشترى هذه الدار
من فلان وهي في
يده او وهبها منه
فذلك يكفي ولو
اراد الشفيع ان
يختلف المشتري
بالله فله ذلك
كذا في المحيط
والذخيرة -

CHAPTER VII

OF THE VENDEE'S REFUSAL TO ADMIT THE
PRE-EMPTOR'S NEIGHBOURHOOD AND
MATTERS APPERTAINING TO IT.

73. The manner in which evidence is to be tendered has been described in the 'Ajnās and it should be thus, "The witnesses should depose that the property which is in the vicinity of the property sold, is the pre-emptor's own property, and it has been so before the vendee purchased the property which is the subject-matter of pre-emption, and that it is still his property and they have no knowledge that it is not in his ownership." If they were simply to say, "this house belongs to this neighbour," it will not be considered sufficient. But if they depose that this pre-emptor had purchased this house from such and such person, or that a certain person made a gift of it to him, then such a deposition would suffice. If the vendee desires the pre-emptor to swear, then he can do so. This is according to the *Muhīt* and the *Zakhīra*.

و عن أبي يوسف⁷
 لوادعى رجل دارا
 وقام ببنيته ان هذه
 الدار كانت في يدي
 ابيه مات وهي
 في يديه فانه يقضى
 له بالدار ولو بيعت
 دار بجانبها فانه
 لا يستحق الشفعة
 حتى يقيم البنية
 على الملك دار
 في يدي رجل
 اقر انها لآخر فبيعت
 بجانبها دار فطلب
 المقر له الشفعة
 فلا شفعة له حتى
 يقيم البنية ان
 الدار دارة كذا في
 محيط السرخسي -
 رجل اشتري
 دارا ولها شفيع
 فاقر الشفيع ان
 دارة التهـ بها
 الشفعة لآخر فان
 كان سكت عن
 الشفعة ولم يطلبها
 بعد فلا شفعة للمقر
 له و ان كان طلب
 الشفعة فلم يقر لها
 الشفعة كذا في
 المحيط - و ذكر
 الخصاف في اسقاط
 الشفعة ان البائع
 اذا اقر بسدهم من
 الدار للمشتري قم باع

According to Imām Abu Yusuf if a person sues for a declaration and tenders evidence to the effect that a certain house was in possession of his father and he died while the house was in his actual possession, then he is entitled to the decree. Thereafter if an adjacent house is sold, then he will not be entitled to pre-empt it, unless he had thus established his ownership of the house. A house is in possession of a certain person and he admits that it belongs to another person, meanwhile an adjacent house is sold then he (the admittor) is not entitled to claim pre-emption unless he establishes ownership of the first house. This is according to the *Muhit-of-Sarakhsī*. A person purchases a house and there is its pre-emptor who admits that his house by reason of which he can claim pre-emption belongs to another person, and if that other person does not demand pre-emption then nevertheless he (the pre-emptor) is not entitled to pre-empt the house, but if that person demands pre-emption then he can also demand pre-emption. This is according to the *Muhit*. Shaikh Khisāf has mentioned in this case that if the seller admits ownership of the vendee in a part of the house, and thereafter sells it to him then the *shāfi‘-i-jār* is not entitled to

منه بقية الدار
 فالجبار لا يستحق
 الشفعة وكان ابو بكر
 الخوارزمي يخطي
 الخصاف في هذه
 ويفتي بوجوب
 الشفعة للجبار والله
 اعلم كذا في
 الذخيرة -

pre-empt it ; but Shaikh Abu Khwāzmi
 differing from Shaikh Khīṣāf holds that
 the *Shafi'i-Jār* is entitled to pre-emption.
 This is according to the *Zakhira*.

الباب الثامن

في تصرف المشتري
في الدار المشفوعة
قبل حضور الشفيع

٧٣ - ان بني المشتري بناء او غرس او زرع ثم حضر الشفيع يقضى له بالشفعه ويحبر المشتري على قلع البناء والغرس في تسليم الساحة الى الشفيع الا اذا كان في القلع نقصان بالارض فللشفيع الخيار ان شاء اخذ الارض بالاثمن والبناء والغرس بقيمة مقلوعها وان شاء اجر المشتري على القلع وهذا جواب ظاهر الرواية واجمعوا ان المشتري لو زرع في الارض ثم حضر الشفيع انه لا يحبر المشتري على قلعه ولكن ينتظر ادراك الزرع ثم يقضى له بالشفعه فيأخذ الارض بمحبوع الثمن كذلك في البدائع ثم اذا ترك الارض

CHAPTER VIII OF DEALINGS BY THE VENDEE WITH THE SUBJECT OF SALE, BEFORE THE APPEARANCE OF THE PRE-EMPTOR.

74. When a purchaser has erected a building, or planted trees or sown seeds in the land, thereafter the pre-emptor appears and a decree is given in his favour, then the purchaser may be required to pull down the building and remove the trees at the time of delivery of the land to the pre-emptor, however if the land is likely to be injured by the removal then the pre-emptor has the option, to take the land at its price, and the buildings and trees at the value of the materials calculated after destruction. This view is expressed in the *Zāhir-ul-Rewāyat*, but with regard to crops, all are agreed that the pre-emptor cannot require the purchaser to remove it, and that he must wait till the ripening of the crops, thereafter the land is to be pre-empted at its full price. This is according to the *Badāyi*. And when the land is left in the hands of the purchaser, it will not be on hire or rent. This problem is mentioned in the *Fatāwa-of-Abu Laysh* as

في يد المشتري يترك
بغير اجر و من
هذا الجنس مسألة
في فتاوى الفقيه
ابي الليث² و
صورتها رجل اخذ
ارضا مزارعة وزرعها
فلما صار الرزق
بقلا اشتري المزارع
الارض مع نصيب
رب الارض من
الرزع ثم جاء الشفيع
فله الشفعة في
الارض وفي نصف
الرزع لكن لا يأخذ
حتى يدرك الرزق
كذا في المحيط -
وفي جامع الفتاوى
ولو اشتري ارضا
فرز عها فنقصتها
المزارعة ثم جاء
الشفيع يقسم على
الارض ناقصة وعلى
قيمتها يوم اشتراها
فيأخذ الشفعة بذلك
الاثمن كذا في التأثار
خانية - اشتري دار
او صبغها باللوان
كثيرة فا لشفيع
بالخيار ان شاء
اخذها او عطاها مزارع
الصبيغ فيها و
ان شاء ترك كذا

follows :—‘If a person takes a land for cultivation, and cultivates it, and the crops are ripened, thereafter he purchases the land together with the share of the landlord in the crops, and subsequently the pre-emptor appears, then he can demand pre-emption in the land and in half of the crops,¹ but he cannot pre-empt the land until the crops are ready. This is according to the *Muhīt*. According to the *Jāmi-‘al-Fatāwā* if a person purchases the land, and cultivates it, and the land is injured by such cultivation, thereafter the pre-emptor appears, then the price is to be fixed according to the value of the land as deteriorated by cultivation, and its value at the time of sale and the pre-emptor is to take the land at the reduced price. This is according to the *Tātar Khāniyya*. If a person has purchased a mansion, and decorates it with paints and drawings, the pre-emptor has an option either to take it on payment of the additional expenses so incurred, or give up his right. This is according to the *Qanyya*. If a man purchases a mansion, and has pulled

¹ It seems that this was the agreement between the parties.

- في القنية
 اذا اشتري رجل
 اداراً و هدم بناءها
 او هدمها اجنبي
 او اذ هدم بنفسه
 ثم جاء الشفيع
 قسم الثمن على
 قيمة البناء مبينا
 وعلى قيمة الارض
 فما اصاب الارض
 اخذها الشفيع بذلك
 معنی المستلة اذا
 انهدم البناء وبقي
 النصف على حالة
 الا انه اذا انهدم
 بفعل المشتري او
 بفعل الاجنبي
 يقسم الثمن على
 قيمة البناء مبينا
 واذا انهدم بنفسه
 يقسم الثمن على
 قيمة مهد وما لان
 بالهدم دخل في
 ضمان الماهم فتعتبر
 القيمة على الوصف
 الذي دخل في
 ضمانه وبالانهدام
 لم يدخل في ضمان
 احد فتعتبر قيمة على
 الحالة التي عليها
 مهد و ما حتى
 انه اذا كان قيمة
 الساحة خمساً
 وقيمة البناء خمسة
 فانهدم البناء، وبقي

down the building, or a stranger has done so, or it has itself fallen down, thereafter the pre-emptor claims his right, then the price is to be divided according to the value of the building as it was while standing and the value of the land, and the pre-emptor is to take the land at so much of the price as corresponds to its value. There is a difference between the case, where the building is destroyed by the act of the purchaser or a stranger, and the case where the building is destroyed by *vis major*; for in the former case, the price is to be divided with reference to the value of the building as it was when standing, while in the latter case the price is to be calculated with reference to its value in the state of ruin, because when the building has been destroyed by somebody then that person is responsible for it and its value is to be estimated as at the time when this incident happened, while if it has itself fallen down, then no one being responsible, its value is to be estimated in its actual state, e.g., if the value of the site were five hundred, and the original value of the building five hundred also, and the building has fallen down, leaving

النقض وهو يساوي
ثلاثمائة قاتل من يقسم
على قيمة الساحة
خمسين و على قيمة
النقض ثلاثة
اثمان فيأخذ الشفيع
الساحة بخمسة
اثمان الثمن و
لو احترق البناء
او ذهب به السيل
ولم يبق شيء من
النقض يأخذ الشفيع
الساحة بجميع
الاثمن لانه لم يبق
في يد المشتري شيء
لأثمن ولو لم يهدم
المشتري البناء ولكن
باعه من غيره
من غير ارض ثم
حضر الشفيع فله ان
ينقض البيع ويأخذ
الكل كذلك المحيط
وان نقضها لمشتري
البناء قبل للشفيع ان
شيئت فأخذ العرصه
بحصتها او ان شيئاً
فدع وليس له ان
يأخذ النقض وكذا
اذا هدم البناء
اجنبي وكذلك اذا
اذ هدم بنفسه ولم
يجعلك لأن الشفعة
سقطت عنه وهو

the old materials of the value of three hundred, then the price is to be divided into eight parts, and the pre-emptor may take the site at five eighths¹ of it. However if the building was burnt down by fire or completely destroyed by inundation, so as to leave nothing of the wreck in the hands of the purchaser, the pre-emptor must take the land at the full price, for no part of the property remains in the hands of the vendee. If the purchaser has not destroyed the building, but sold it without the land, and then the pre-emptor appears, he may pre-empt the whole and thereby avoid the sale. This is according to the *Muhit*. If the building was destroyed by the purchaser, the pre-emptor may either take the site at its proportionate price or give up his claim, but he cannot take the wrecked materials. The same rule applies in the case where the building has been pulled down by a stranger or has fallen by itself the pre-emptor cannot take the materials, for they are now separate and there is no right of pre-emption in them. Similarly if the purchaser has removed the gate of

¹ That is $\frac{5}{8}$ of 800 = 500

عين قائمة ولا يجوز
ان يسلم للمشتري
بغير شئ وكذا
لو نوع المشتري بباب
الدار وباعه تسقط
عن الشفيع حصة
كذا في السراج
الوهاج -

٧٥ - و اذا اشتري
دارا ففرق نصفها
فصار مثل الفرات
يبحري فيه الماء
لا يستطيع رده ذلك
عنها فللشفيع ان
يأخذ الباتي بحصة
من الثمن ان
شاء و اذا اشتري
فوهة بناء ها لرجل
او تزوج عليها
و هدم لم يكن
للشفيع علي البناء
سبيل ولكن يأخذ
الارض بحصتها
من الثمن وان
كان لم يهدم فله
ان يبطل تصرف
المشتري و يأخذ
الدار كلها بمجمل
الثمن كذا في
المبسوط - اذا اشتري
ارضا فيها نحل
او شجر فيه ثمر
واشترط ثمرة في
البيع ثم جاء
الشفيع والشرقاية

the building its price will be deducted from the original price. This is according to the *Sirāj-al-Wahhāj*.

75. If a person purchases some property half of which is submerged in the water, and has become one with it just like the Euphrates so that its reclamation is impossible, then the pre-emptor has a right to take the remaining half at its proportionate price. If a person purchases some property, land with a building on it, thereafter he makes a gift of the building to some other person, or has assigned it to a woman as her dower, and it has been destroyed, now the pre-emptor cannot possibly take the building, but can pre-empt the land on proportionate payment of its price, and if the building was not demolished, then the pre-emptor has a right to take the whole property at its full price and thereby nullify any transaction effected by the vendee. This is according to the *Mabsūt*. And if a person purchases some land having trees and other trees bearing fruits with an express condition

فله ان يأخذ ذلك
اجمع استحساناً
فإن جاء وقد جرّة
البائع أو المشتري
أو أجنبي فلا شفعة
في الشرة و يأخذ
الارض والنخل
بالحصة من الثمن
ان شاء وعند حصة
الثمرة يقسم الثمن
علي قيمة الارض
والنخل والثمر يوم
العقد فما اصاب
الثمرة سقط عن
الشفعي وقيل له
خذ الارض والنخل
بحصته ما ان شيئاً
فإن أخذها الشفعي
وبقيت الثمرة في
يد البائع فان
محمد^ص قال يلزم
المشتري الثمرة ولا
ختار له في ردها
ولو كانت الثمرة
قائمة تقبيضاً للمشتري
وأكلها أو باعها
أو تلفت في يده
علي وجه من الوجوه
فاراد الشفعي الاخذ
سقط عنه حصة

in the contract that the fruits will belong to the vendee, thereafter the pre-emptor appears at the time when the fruits were ready, then according to the doctrine of *Istehsan* he has the right to take the whole property sold. But if the pre-emptor came at a time when either the vendor or the vendee or the stranger had removed the fruits, then he will have no right of pre-emption in the fruits, but if he desires, he may take the land and the trees on payment of their proportionate price. And to ascertain the value of the fruits the original price will be divided according to the value of land, trees, and the fruits as they were at the time when the contract was effected, and the price of the fruits will be deducted in favour of the pre-emptor, and he may take the trees and the land at so much of the price as corresponds to their values. And if the pre-emptor has pre-empted them both¹ while the fruits were in the possession of the vendor, then according to Imam Muhammad the vendee may take the fruits. If the fruits were ready and the vendee after taking possession of the property had consumed them,

¹ That is the land and the trees.

الثمرة وان كان البيع قد وقع ولا ثمرة ثم اشر في يد البائع بعد البيع قبل القبض ثم جاء الشفيع فانه يأخذ الارض والنخل والثمر وليس له ان يأخذ بعضها دون بعض ويكون عليه جميع الثمن ولو جرة البائع او المشتري او اجنبي وهو قائم في يد البائع او المشتري اخذ الشفيع الارض والنخل بحصة ان شاء وان كانت الثمرة ذهبت بغير فعل احد بان احترق او اصابتها آفة فهلكت فلم يبق منها شيء له قيمة اخذها الشفيع بمجموع الثمن ان شاء وان شاء ترك ولو كان البائع او المشتري صرم الثمر ثم هبكم بعد ذلك بغير فعل احد بان

or had sold them, or they were destroyed on account of some cause, and now the pre-emptor desires to pre-empt the property, then the price of the fruits will be deducted from the sale consideration. And if the sale took place at a time when the trees had no fruits, and afterwards the trees bore fruits while they were still in the possession of the vendor, and before the possession had been taken by the vendee, thereafter the pre-emptor appears, then he is entitled to take the land, the trees and the fruits, and he has no option to take one thing and reject the other ; and he shall pay the full sale consideration. If the fruits were plucked either by the vendor, or the vendee or any stranger, while they were in the possession of either of the vendee or the vendor, then the pre-emptor if he desires, may take the land and the trees on paying their proportionate price. If the fruits were not destroyed by an act of the vendee or the vendor, for example, were burnt, or were destroyed by any calamity *vis major* so that nothing remains, then the pre-emptor has the option of taking the whole at its full price, or abandon it altogether. But if the vendor or vendee had plucked the fruits, and subsequently

اصابه سيل فذهب
به ونار فاحتراق فان
ابا يوسف[؟] قال ذلك
سواء لان ذلك قد صار
للمشتري ولا شفعة
فيه فلا يالى هلكت
بفعل المشتري او
بعبر فعله لان الثمرة
لما انفصلت سقط
حق الشفيع عنها
فكأنها كانت في
الاصل منفصلة ولو
كان المشتري قبض
الارض والنخل والا
ثمرة فيه ثم اشر في
يده ثم جاء الشفيع
والتثمر متعلق
 بالنخل فله ان
يأخذ الارض والنخل
والشrub بالثمن الذي
وقع عليه البيع
لزياد عليه شيء فان
كان المشتري لما
حدثت الثمرة في
يده جرها ثم جاء
الشفيع وهي قائمة
او قد استهلكتها
المشتري ببيع او
أكل فان الشفيع
يأخذ الارض والنخل

they were destroyed, but not by any act of either of them, for example they were swept away by an inundation or destroyed by fire, then according to Imām Abu Yusuf, this case is similar to the former case, because these fruits had already become the property of the vendee. However, it seems that Imām Abu Yusuf does not consider whether they were destroyed by the act of the vendee or not, for when they were separated from the trees then as regards the fruits the right of pre-emption was extinguished just as if they were originally separate. If at the time when the vendee had taken possession of the land and the trees, they were fruitless, but bore fruits afterwards, thereafter the pre-emptor appears while the fruits were still hanging on the trees, then he is entitled to take the land, the trees with fruits, all on payment of the original price and nothing more will be added to it ; but in the case where the trees bore fruits while they were in the possession of the vendee, and he has plucked them, thereafter the pre-emptor appears while the fruits so plucked are still in his possession, or have been disposed of by sale, or have been consumed by him, then the pre-emptor is entitled

بجميع الثمن ان
شاء ولا سبيل له
علي التمر كذا في
السراج الوهاج -
٧٦ - ولو تصرف
المشتري في الدار
المشتراة قبل اخذ
الشقيق بان ويهما
وسلمها او تصدق
بهما او آجرها او
جعلها مسجدا و
صلى فيهما او وقفها
وتفا او جعلها مقبرة
ودفن فيها فلذلك شقيق
ان يأخذ وينقض
تصرف المشتري
كذا في شرح الجامع
الصغير لقاضي
خان - يحب ان
يعلم ان تصرف
المشتري في الدار
المشفوعة صحيح
الي ان يحكم
بالشفعة للشقيق و
له ان يبيع و ان
يوجر و يطيب له
الثمن والاجر وكذا
له ان يهدم وما
اشبه ذلك من
التصرفات غير ان
للشقيق ان ينقض
كل التصرف الا
القبض وما كان من
تمام القبض الا يرجى

to take the land and the trees on payment of the price, and as regards the fruits he has no right of pre-emption. This is according to the *Sirāj-al-Wahāj*.

76. If the vendee disposes of some purchased mansion before it is taken by the pre-emptor, as for instance, by gift and delivery, or by letting it on hire, or converting it into a *masjid* and allowing people to offer their prayers in it, or makes it a *waqf*, or a cemetery permitting burial, nevertheless the pre-emptor is entitled to pre-empt the mansion and thereby cancel all those transactions effected by the vendee. This is according to the *Jamī-i-Saghīr* of Kazi Khan. And it is proper to observe that all transactions of the vendee with respect to the property, subject to the right of pre-emption, such as the sale of it, or letting it on hire, are valid, until the Court's decree is given in favour of the pre-emptor. The vendee has also the right to demolish the property or do any similar act with respect to it, nevertheless the pre-emptor is entitled to cancel all acts of the vendee except the act of taking possession of the property itself and all that is necessary to complete it ; for if the pre-emptor

ان الشفيع لو اراد
ان ينقض قبض
المشتري لبعيد
الدار الى يد البائع
ويأخذها منه
لما يكون له ذلك
كذا في الذخيرة -
لو اشتري نصف
دار غير مقسوم
اخذ الشفيع حظه
الذي حصل له
بقسمته وليس له ان
ينقض القسمة سواء
كانت القسمة بحكم
القاضي او التراضي
بخلاف ما اذا باع
احد الشريكين
نصيبه من الدار
المشاركة وقاسم
المشتري الشريك
الذى لم يبع حيث
يكون للشفيع نقضه
لان العقد لم يقع
من الذي قاسم فلم
تكن القسمة من
تمام القبض ثم اذا
لم يكن للشفيع
نقض قسمته كان له
ان يأخذ نصيب
المشتري في اي
حاصب كان وهو موروث
عن ابي يوسف
واطلاق الكتاب
بدل عليه كذا في
التبيين -

were to avoid this also, then he will be relegating the property back to the vendor and it will not be pre-emptable at all. This is according to the *Zakhīra*. If a person purchases half of an undivided mansion, then the pre-emptor must take the portion which comes on partition to the share of the purchaser, and he cannot dissolve the partition, whether made voluntarily or by the order of the Court. But this is contrary to the case where one of two partners sells his share in a mansion, and the vendee effects a partition with the other partner; for here the pre-emptor may cancel the partition, as the partition was not made by the party with whom the contract was made, and the act of partition is not, an act towards completion of the act of taking possession of the property. Hence in the case where the pre-emptor is not entitled to cancel the vendees' partition, the pre-emptor can only pre-empt the portion already partitioned; the same is reported from Abu Yusuf. This is according to the *Tabayīn*.

رجلان - ۷۷
 اشتريا دارا و هما
 شفيغان و لها شفيع
 ثالث اقتسمها ثم
 جاء الثالث فله
 ان ينقض القسمة
 اقتسمها بقضاء
 او غير قضاء كذا في
 الذخيرة-رجل اشتري
 ارضا بمائة درهم
 ورفع منه التراب
 وباعه بمائة درهم
 ثم جاء الشفيع
 و طلب الشفعة
 قال الشیعیم الامام
 ابو بکر محمد بن
 الفضل يأخذ
 الشفیع الارض بنصف
 الثمن وهو خمسون
 درهما يقسم الثمن
 على قيمة الارض قبل
 رفع التراب و على
 قيمة التراب المعرف
 ثم يطرح عن
 الشفیع قيمة التراب
 وقال القاضی الامام
 علي السعدي[ؑ]
 لا يطرح عن الشفیع
 نصف الثمن و اسا
 يطرح عنه حصة
 النقصان فلو ان

77. Two persons who are at the same time its pre-emptors purchase some property. It has a third pre-emptor also. After the purchasers have divided the house, the third pre-emptor appears, then he is entitled to dissolve their partition irrespective of the fact that it was effected by the decree of Court or by mutual agreement. This is according to the *Zakhira*. A person purchases a land for 100 *dirhams* and then digs out its soil which he sells for 100 *dirhams* thereafter the pre-emptor appears, and demands pre-emption. As regards such a case Shaikh-ul-Imām Abu Bakr Muḥammad bin Fazl says that the pre-emptor is entitled to take the land on payment of half of its price, that is, for 50 *dirhams*. The price will be divided between the value of the land as it was before the soil had been taken from it and the value of the soil after it has been dug out, and then a remission of the value of the soil accordingly will be made in favour of the pre-emptor ; but Kāzī Imam Ali Sūghdī holds that half of the original price of the land will not be remitted in favour of the pre-emptor, but so much of it will be remitted from the full price as is the actual loss to the pre-emptor, and hence

المشتري كبس الأرض بعد ما رفع منه التراب فاعادها كما كانت قبل ان يحضر الشفيع ثم حضر الشفيع قال الشيخ الامام ابو بكر محمد بن الفضل يقال للمشتري رفع من الأرض ما احدثت كذا في فتاوى قاضي خان -

٧٨ - ولو باع نصف دار من رجل ليس بشفيع وقاسمة باسم القاضي فقدم الشفيع ونصيب البائع بين دار الشفيع وبين نصيب المشتري فانه لا تبطل شفعته فان باع البائع نصبيه بعد القسمة قبل طلب الشفيع الشفعة الاولى ثم طلب الشفيع فانه ينظر ان قضي القاضي بالشفعة الاخيرة جعلها بينهما نصفين لأن المشتري قد صار

if the vendee fills it up, and restores it to its original state, before pre-emption is demanded, and afterwards the pre-emptor appears, then Shaikh Imam Abu Bakr Muhammad bin Fazl holds that the vendee should be asked to remove all that by which he has filled the land. This is according to the *Fatāwā-i-Kazi Khan*.

78. If a person sells half of his house to a person who is not its pre-emptor, thereafter partitions it by the order of the Kazi, and it so happens that the share of the vendor intervenes between the house of the pre-emptor and the share of the vendee, thereafter the pre-emptor appears, then his right of pre-emption is not invalidated. Meanwhile, if the vendor sells his share after partition, but before the demand of pre-emption by the pre-emptor on the first sale, and thereafter the pre-emptor demands pre-emption, then it depends whether the Kazi decrees pre-emption on the second sale, for if so, then this share would be divided equally between the vendee and the pre-emptor because the vendee

جار المصيб البائع
 كالشفيع فاستو يافية
 وان بدا فتشي
 بالاولى للاول تشبي
 له بالاخيرة ايصالانه
 لم يبق المشتري
 الاول ملك كذا في
 محيط السر خسي -
 ذكر في المتنقى
 قال اذا اشتري دارا
 بالفدر هم ثم باعها
 بالفين فعلم الشفيع
 بالبيع الثاني ولم
 يعلم بالاول فلخاصم
 فيها فاخذ لها
 بالشفعية بالبيع
 الثاني بحكم
 الحكم او بغير
 حكمة ثم علم بالبيع
 الاول فليس له ان
 ينقض ما اخذه
 وبطلت شفعته في
 البيع الاول وكذلك
 لوبا عنها صاحبها
 بالف ثم ناقصة
 المشتري وردها ثم
 اشتراها منه الشفيع
 بالفين ولا يعلم
 بالبيع الاول ثم علم

now has also become neighbour in the same way as the pre-emptor, to the share which is the subject matter of pre-emption, and so they are equal as regards their right of pre-emption ; but if the Kāzī decrees pre-emption on the first sale, then another decree of pre-emption will be given as regards the second sale in favour of the pre-emptor for now the first vendee will no longer be owner of that part of house. This is according to the *Muhīt* of *Sarakhsī*. It is mentioned in the *Muntaqā* that if a person purchases a house for 1,000 *dirhams* and then he sells it for 2,000 *dirhams* thereafter the pre-emptor is informed of the second sale, and he being ignorant of the first sale, obtains the house in pre-emption on the second sale, and it is immaterial whether he takes in virtue of the decree of the Kāzī or not. Subsequently he hears of the first sale then he is not entitled to dissolve the decree and his right of pre-emption in the first sale has been invalidated. And similarly if an owner sells the house for 1,000 *dirhams* and they (vendor and vendee) rescind the contract and the vendee returns the house to the vendor, thereafter the pre-emptor purchases the house for 2,000 *dirhams* being

بـهـ لـمـ يـكـنـ لـهـ أـنـ
يـنـقـضـ شـرـاءـ كـذـاـ فـيـ
الـمـحـيـطـ وـلـوـ كـانـ
المـشـتـرـيـ حـيـنـ اـشـتـرـاءـ
بـالـفـ نـاقـشـةـ الـبـيـعـ
ثـمـ اـشـتـرـاءـ بـالـفـيـنـ
فـاخـذـ الشـفـيـعـ بـالـفـيـنـ
وـلـمـ يـعـلـمـ بـالـبـيـعـ
الـأـولـ ثـمـ عـلـمـ بـهـ لـمـ
يـكـنـ لـهـ أـنـ يـنـقـضـهـ
سـوـاءـ كـانـ بـقـضـاءـ أـوـ
بـغـيـرـ قـضـاءـ كـذـاـ فـيـ
الـبـدـاـيـعـ -

ignorant of the first sale, and afterwards he is informed of it, then he is not entitled to dissolve the contract of sale. This is according to the *Muhīt*. If the vendee having purchased the house for 1,000 *dirhams* mutually dissolves the contract, and thereafter again purchases it for 2,000 *dirhams* and the pre-emptor pre-empts the house for 2,000, *dirhams* being ignorant of the first sale, but afterwards he is informed of it, then he cannot dissolve the contract of sale; it is immaterial whether he has obtained the house by the decree of the *Kāzī* or by mutual arrangement. This is according to the *Budāyi'*.

٧٩ - لـوـ اـشـتـرـاءـهـ
بـالـفـ فـرـادـةـ فـيـ
الـثـمـنـ الـفـاـ فـعـلـمـ
الـشـفـيـعـ بـالـفـيـنـ وـلـمـ
يـعـلـمـ بـالـلـفـ فـانـ
اـخـذـ بـالـلـفـيـنـ بـقـضـاءـ
ابـطـلـتـ الـرـيـادـةـ عـلـيـهـ
الـفـ وـانـ اـخـذـهـ
بـرـضـاءـ كـانـ الـاـخـذـ
بـمـنـزـلـةـ شـرـاءـ مـبـتـداـ
فـلـمـ يـبـقـ حـقـ الشـفـعـةـ
كـذـاـ فـيـ مـحـيـطـ
الـسـرـخـسـيـ - وـلـوـ

79. If a vendee purchases the house for 1,000 *dirhams* but he augments the sale-consideration by 1,000 *dirhams* more, and the pre-emptor took the price to be 2,000 *dirhams*, being ignorant of its sale for 1,000 *dirhams*, then if the pre-emptor pre-empts the house for 2,000 *dirhams* under the decree of the Kazi, the augmentation becomes invalid, and he should pay only 1,000 *dirhams*, but if he takes the house by mutual arrangement, then the transfer is regarded as a sale

ولو اوصي المشتري لانسان كان للشفيع ان ينقض الوصية و يأخذ من الورثة والعهدة عليهم كما في التاتار خانية - ولو اشتري قرية فيها بيوت واسحجار ونخيل ثم انه باع الاشجار والبناء فقط المشتري بعض الا شجوار بعدم بعض البناء ثم حضر الشفيع كان له الارض وما لم يقطع من الاشجار وما لم يهدم من البناء وليس له ان يأخذ ما ما قطع ويطرح عن الشفيع حصة ما قطع من الشجر وما هدم من البناء كما في فتاوى قاضي خان - ولو اشتري دارا فهدم بناءها ثم بنى فاعظم المنفعة فان الشفيع يا خذ لها بالشفاعة وبقسم الثمن على

ab initio and the right of pre-emption becomes extinct. This is according to the *Muhit-of-Sarakhs*. If the purchaser has bequeathed the property, then the pre-emptor is entitled to take the property from his heirs, legal representatives, on whom will rest the responsibilities of the contract. This is according to the *Tatár khāniyya*. And if a person purchases a village in which there are houses, and trees, date palms and thereafter he sells the trees and houses and the new purchaser cuts down some of the trees, and destroys some of the houses, thereafter the pre-emptor appears, then he is entitled to pre-empt the property the trees not already cut down and the houses not destroyed, and to a deduction from the price in respect of the trees that have been cut and the houses destroyed. This is according the *Fatāwā-i-Kazi Khan*. If a person purchases a house, pulls it down, and then rebuilds one of increased value on its site, then the pre-emptor has a right to pre-empt it, the price will be determined according to the value of the lands and the buildings as they were at the

قيمة الأرض والبناء time of purchase, and the purchaser الذي كان فيها may remove the new erected constructions.¹ This is according to the يوم اشتري ويسقط حصة البناء لأن *Mabsūt*.

المشتري هو الذي
هدم البناء وينقض
المشتري بناء ها
المحدث عندنا كذا
في المبسوط -

¹ Provided the pre-emptor is not willing to purchase it at the price of the materials. This appears not to be a case of a purchase in good faith, and it seems to me that this part of the law, in British India, is likely to be determined by section 51 of the Transfer of Property Act.

الباب التاسع

فيما يبطل به حق
الشفعة بعد ثبوته
وما لا يبطل

٨٠ - ما يبطل
به حق الشفعة بعد
ثبوته ذو عان
اختياري و ضروري
والاختياري ذو عان
صريح و ما يجري
محراة و دلالة اما
الاول فنحو ان يقول
الشفيع ابطلت الشفعة
او سقطتها او ابراتك
عنها او سلمتها
او نحو ذلك سواء
علم بالبيع اولم يعلم
بعد ان كان بعد
البيع لان اسقاط
الحق صريحا ينتهي
فيه العلم والجهل
بحلف الا سقط
من طريق الدلالة
فانه لا يسقط حقه
ثم الا بعد العلم
اما الدلالة فهو ان
يوجد من الشفيع

CHAPTER IX

HOW THE RIGHT OF PRE-EMPTION AFTER
IT HAS ACCRUED IS RENDERED VOID.

80. The right of pre-emption is rendered void in two different modes after it has accrued ; (1) *Ikhtiyari*, voluntary, (2) *Zaruri*, necessary. The first *Ikhtiyari* is of two kinds :—*Surrih*, express, and *dalalat* implied. When the pre-emptor uses such expressions as these, 'I have made my right of *Shufa'* void,' or 'I have waived my right of pre-emption,' or 'I have released you from my right of pre-emption,' or 'I have surrendered it to you,' and it is immaterial whether the pre-emptor is or is not aware of the sale, provided, however, that the sale has actually taken place, because when a person expressly surrenders his right of pre-emption, there is no question of ignorance, or knowledge on his part. The right of pre-emption is rendered void by implication, when any action on the part of the pre-emptor, indicates acquiescence in the sale to the purchaser, as for instance, when being informed of the

ما يدل على رضاه
بالعقد و حكمة
المشتري نحو ما
اذا علم بالشراء
فترك الطلب على
الفور من غير عذر
او قام عن المجلس
او تشغل عن
الطلب بعمل آخر على
اختلاف الروايتين
وكذا اذا ساوم
الشفيع الدار من
المشتري او ساله من
بوليها ايها او استاجرها
الشفيع من المشتري
او اخذها مزارعة او
معاملة و ذلك كلها
بعد العلم هكذا في
البدایع - ولو استودعه
او استوصاه او ساله
ان يتصدق بها
عليه فهو تسليم
هكذا في القاتار
خانية - ولو قال
المشتري او وكيلها

purchase, he refrains without sufficient excuse, from claiming his right by not demanding it immediately, or he rises from the meeting, or he pursues some other occupation ; this view is according to the two different reports of what is essential for the performance of the claim of pre-emption on hearing of the sale, and similarly if the pre-emptor has made an offer for the house to the purchaser, or has asked him to sell the house to him,¹ at the same price or he takes it from him on hire, or in *muzarat*, for purposes of cultivation and any such acts is done with knowledge of the purchase then the right of pre-emption will be deemed to have been extinguished. This is according to the *Badāyi'*. And if the pre-emptor asks the vendee to entrust the property sold to him, or to bequeath it to him, or give it to him in charity *sadqah*. These acts are also deemed sufficient to invalidate the right of pre-emption. This is according to the *Tatār Khāniyya*. If the vendee says 'I

¹ Thus acknowledging the sale.

بكل ذلك فالشفيع
نعم فهو تسليم
هكذا في الذخيرة -

am prepared to sell this house to you, and the pre-emptor says 'Yes,' this also amounts to the surrender of the right of pre-emption.¹ This is according to the *Zakhirah*.

٨١ - أما الضروري
فتخوان بموت الشفيع
بعد الطلبين قبل
الأخذ بالشفعة فتبطل
شفعته وهذا عندنا
ولا تبطل بموت
المشتري وللشفيع
ان يأخذ من
وارثة كذا في
البدائع -

81. The right of pre-emption is rendered void *Zururi*, necessarily, if the pre-emptor dies after the two demands, and before taking possession of the property ; then according to our jurists the right is extinguished. However, the right of pre-emption is not rendered void by the death of the vendee and according to all jurists the pre-emptor can, assert his right, and take the property from the heirs of the vendee. This is according to the *Badāyi'*.

٨٢ - تسليم الشفعة
قبل البيع لا يصح
وبعده صحيح علم
الشفيع بمحظوظ
الشفعة او لم يعلم
وعلم من اسقط اليم
هذا الحق او لم

82. The surrender of the right of pre-emption before the sale is not valid, but if made after the sale it is valid, irrespective of the fact whether the pre-emptor is aware of the existence of his right of pre-emption or not, and it is immaterial whether the person in whose favour the right of pre-emption is surrendered

¹ Because he thereby admits the validity of the sale to the vendee.

يعلم كذا في
المحيط -

- ٨٣ - اذا قال
المشتري للشفيع
انفقت عليها كذا
في بنائها وانا
اوليه بذلك وبالثمن
فقال ذم فهـو تسليم
منه كذا في
المسبوط-ذ كرمـسائل
تسليم الشفعة في
الباب العاشر من
كتاب الصلح ولا
يصح تسليم الشفعة
بعد ما اخذ الدار
بالشفعة ولا يصح
التسليم في الهيئة
بعوض قبل القبض
كذا في التأثار
خانية - وادا سلم
الشفيع الشفعة في
هبة بعوض بعد
التقاضـ ثم اقر
البائع و المشتري
انها كانت بيعـا
بذلك العوض لم

is aware of it or not. This is according to the *Muhiṭ*.

83. And if the vendee says to the pre-emptor 'I have spent so much on the buildings of this house and I am prepared to sell it to you on payment of its price and my expenses,' and if the pre-emptor says 'Yes,' then it is regarded as the surrender of the right of pre-emption.¹ This is according to the *Mabsūṭ*. The problems of the surrender of the right of pre-emption are mentioned in the chapter X of the Book of *Sulha*. The surrender of the right of pre-emption is useless after the house has been actually pre-empted and in the case of *Hiba-bi-Shartil-iwaz* before possession of the properties has been taken, it is useless to surrender the right of pre-emption. It is so mentioned in the *Tātār Khāniyya*. And if the pre-emptor has surrendered the right of pre-emption in *Hiba-bi-Shartil-iwaz* after possession has been interchanged, and thereafter the vendor and vendee affirm that it was not a *Hiba* but a sale for consideration, then the pre-emptor is not entitled to

¹ Because he thereby admits the sale.

تكون للشفيع فيها
الشفعه وان سلمها
في هبة بغير عوض
ثم تصادقا انها
كانت بشرط عوض
او كانت بيعا
فللشفيع ان يأخذها
با لشفعه و اذا
وهب رجل دارا
على عوض الف
درهم فقبض احد
العوضين دون الآخر
ثم سلم الشفيع
 فهو باطل حتى
اذا قبض العوض
الآخر كان له ان
يأخذ الدار بالشفعه
لأنه اسقط حقه قبل
الوجوب فالهبة
بشرط العوض انما
يصير كالبيع بعد
التقاضي و تسليم
الشفعه قبل تقرر
سبب الوجوب باطل
كذا في المسبوط -
فاذما وهب الشفيع
الشفعه او باعها
من انسان لا
يكون تسليما
هكذا ذكر في

the right of pre-emption. And if he has surrendered the right of pre-emption in *Hiba* without return, thereafter the parties affirm, that it was *Hiba-bi-Shartil-iwaz* (gift with return), or that it was a sale, then the pre-emptor will be entitled to the right of pre-emption. And if a person makes a gift of his house to another in exchange of 1000 *dirhams* and one of the subjects of exchange has been taken possession of, thereafter the pre-emptor surrenders the right, then it is useless, thus when the other subject of exchange will be taken possession of, the pre-emptor will become entitled to pre-empt the house, for the right of pre-emption was surrendered before it had accrued in his favour, because *Hiba-bi Shartil-iwaz* is transformed into a sale after possession is actually interchanged, and the surrender of the right of pre-emption before the cause of pre-emption has accrued is void. This is according to the *Mabsūt*. And if the pre-emptor makes a gift or sells his right of pre-emption to another person then this does not amount to a surrender of the right of pre-emption. This is according to the *Fatawa* of *Ahl-i-Samarkand*; but *Shamsul Ilamah Sarakhsī* has described in *Sharh*

فتاوی اهل سمر قند
و ذکر شمس
الائمه السرخسی
فی شرح کتاب
الشفعة قبل باب
الشهادة اذا باع
الشفعة کان ذلك
تسليما للشفعة ولا
يجب المال وهو
الصحيح وقد ذکر
محمد[ؐ] فی شفعة
الجامع ما يدل
عليه کذا فی
الخطیط -

٨٣ - اذ سلم
الشیع الشفعة ثم
زاد بعد ذلك فی
البیع عبدال او امة
کان للشیع ان
یأخذ الدار
بحصتها من الثمن
و اذا سلم الشفیع
الشفعة ثم حط
البائع من الثمن
 شيئا فلہ الشفعة لان
الخطیط تتحقق باصل
العقد كما لو خبر
بالبیع بالف وسلم
فاذ البیع خمسماۃ

Kitāb-al-Shuf'a in chapter of *Shahādat* that if the pre-emptor sells the right of pre-emption, then it will be deemed as the surrender of the right of pre-emption and the sale consideration will not be due in lieu of it. This view is correct. And Imam Muhammad in *Shuf'atul-Jām'i* also appears to approve of this view. This is according to the *muhīt*.

84. If after the pre-emptor has surrendered his right of pre-emption, the vendor adds a slave male or female to the house sold, then the pre-emptor will be entitled to pre-empt the house on paying its corresponding value. And if the pre-emptor has surrendered his right of pre-emption, thereafter the vendor reduces the price, then the pre-emptor will again be entitled to avail himself of his right of pre-emption, because the abatement is deemed to be a part of the original contract of sale, as for instance, if the pre-emptor receives information that the sale was for 1000, *dirhams* and he surrendered his right of pre-emption,

كذا في الذخيرة -
 اذا قال الشفيع سلمت
 شفعة هذه الدار كان
 تسلیماً صحيحاً
 وان لم يعين احداً
 وكذلك لو قال للبائع
 سلمت لك شفعة
 هذه الدار والدار في
 يد البائع كذا
 في المحيط ولو قال
 للبائع بعد ماسلم
 الدار الي المشتري
 سلمت الشفعة لك
 صحيحاً استحساناً
 ولو قال سلمت الشفعة
 بسببك او لاجلك
 صحيحاً تسلیمه قیاساً
 واستحساناً كذلك في
 فتاوى قاضي خان -

٨٥ - و اذا كان
 المشتري وكيلاً من
 جهة غيره بشراء
 الدار فقال الشفيع
 سلمت شفعة هذه

while the sale was really for 500 dirhams then the right of pre-emption is revived. This is according to the *Zakhīrah*. And if the pre-emptor says "I surrender my right of pre-emption in this mansion," the surrender is valid though no person in particular is mentioned, and in like manner, if he should say to the vendor 'I have surrendered my right of pre-emption in this mansion to you,' the mansion being still in the vendor's possession, the surrender will be valid. This is according to the *Muhibb*. If the pre-emptor should say to the vendor after he has delivered the mansion to the vendee, 'I have surrendered the right of pre-emption in this mansion to you,' the surrender will still be valid according to the doctrine of *Istihsān*. While, if he should say to the vendor, "I have surrendered it for your sake," or "on account of you," the surrender will be valid according to *Qiās* as well as *Istihsān*. This is according to the *Fatāwā-i-Kazi Khān*.

85. And if the vendee is the agent for another person in the sale of the house, and the pre-emptor says "I have surrendered my right of pre-emption in this house" and he did

الدار ولم يعين احدا كان تسليما صحيحا وكذلك لو قال للوكيل سلمت لك شفعة هذه الدار والدار في يدا لو كيل صح التسليم قياسا واستحسانا ولو قال ذلك للو كيل بعد مادفع الدار الي الموكل صح التسليم استحسانا و اذا كان المشتري وكيل من غيره بالشراء فقل له الشفيع سلمت لك شفعة هذه الدار خاصة دون غيرك كان هذا تسليما صحيحا للامر كذا في المحيط - ولو قال الاجنبي سلمت شفعة هذه الدار سقطت كذا في محيط السرخيسي - ولو قال الشفيع لاجنبي ابتدأ سلمت شفعة هذه الدار لك

not mention any person, then the surrender will be valid. And similarly if the pre-emptor should say to the agent, "I have surrendered my right of pre-emption in this house to you," while the house is in the possession of the agent, the surrender will be valid according to the *Qiās* and *Istehsan* and if the pre-emptor says the same to the agent after he had delivered possession of the house to the principal, then the surrender will be valid according to *Istehsan*. And if the vendee is an agent for another person in the sale, and the pre-emptor says to him, "I have surrendered the right of pre-emption in this house to you specially excluding all others, this will amount to a valid surrender by the pre-emptor in favour of the principal. This is according to the *Muhīt*. And if the pre-emptor were to say to a stranger, "I have surrendered the right of pre-emption in this mansion," then there will be a surrender. This is according to the *Muhīt of Sarakhsī*. But if the pre-emptor should say to a stranger at the beginning, "I have surrendered the right of pre-emption in this house to you," or "I have withdrawn

او قال اعرضت عنها
لكل لا يصح تسليمها
ولا تبطل شفعة
قياسا واستحسانا
ولو قال لاجنبي
سلمت الشفعة للموكل
او قال و هبتهما
للموكل لا او قال
اعرضت عنها للموكل
لأجلك و شفاعتك
صح تسليمها للأمر
وتبطل شفعة كذا
في فتاوى قاضي
خان - ولو قال
الشيعي اجنبي سلم
الشفعة للموكل
فالقد سلمتها
لك او وهبتهما او
اعرضت عنها كان
تسليما في
الاستحسان لأن
الاجنبي اذا اخاطبه
بتسلیم لزيد
فالقد سلمتها
لك فان هذا كلام
خرج مخرج الجواب
فصار كأنه قال
سلمتها له لأجلك
ان قال الشيعي
لما خاطبه الاجنبي

the right of pre-emption in respect of you "the surrender will not be valid and his right of pre-emption will not be annulled both, according to the doctrines of *Qiās* and *Istehsan*; but if the pre-emptor should say to the stranger, "I have given up the right of pre-emption in favour of the principal," or he should say "I have made a gift of the right to the principal, or "I have withdrawn my right of pre-emption in the house in favour of the principal for your sake," then the surrender will be valid in favour of the principal and the right of pre-emption will be invalidated. This is according to the *Fatāwā-i-Kāzī Khan*. If a stranger should say to the pre-emptor, "Surrender the right of pre-emption in favour of the principal," thereupon the pre-emptor says, "I have surrendered the right for your sake," or "I have made a gift of the right for your sake," or "I have waived my right for your sake," then it will be a valid surrender in favour of the principal according to *Istehsan*; because when the stranger requested the pre-emptor to surrender the right in favour of the principal, and the pre-emptor said, "I have surrendered the right of pre-emption to you,"

قد سلمت لك شفعة
هذه الدار وعنت
لك شفعتها او بعثتها
منك لم يكن ذلك
تسليما لان هذا
كلام مبتدأ فلا
نيطوي تكت الجواب
لا ستقلاله بنفسه
فلا يكون تسليما
كذا في السراح
الوهاج - وادا قال
اجنبي الشفيع
اصالحك على كذا
على ان تسلم
الشفعة فسلم كان
تسليما صحيحا
ولايحب المال ولو
قال اصالحك على
كذا على ان
تكون الشفعة لي
كان الصلح باطلأ
وهو على شفعة
كذا في التاتار
خانية - ولو ان
اجنبيا قال للشفيع
اصالحك على كذا
من المدراهم على
ان تسلم الشفعة
ولم يقل لي فقبل
الشفيع لا يحب

these words were uttered in response to the request, and therefore they mean, "I have surrendered the right of pre-emption in favour of the principal for your sake." But if the pre-emptor were to say, without being addressed by the stranger, "I have surrendered the right of pre-emption in this mansion in respect of you," or "I have made a gift of the right of pre-emption to you," or I have sold the right to you," all this would not amount to a surrender in favour of the principal, because these statements of the pre-emptor were mere spontaneous utterances. This is according to the *Sirajal-Wahaj*. And if the stranger should say to the pre-emptor, "I shall compound your claim for consideration on condition that you will surrender the right of pre-emption for the principal," thereupon the pre-emptor surrendered it, then the surrender will be regarded as valid but the consideration will not be legally due. And if the stranger should say, "I compound your claim for so much consideration on condition that you will entitle me to enforce the right of pre-emption, then such a compromise is void ; and the pre-emptor's right of pre-emption remains intact. This is according to the *Tatār Khāniyya*. And

المال على الا جنبي
ولا تبطل شفعة
وان قال الشفيع
للبائع سلمت لك
بيبعك او قال لامشتري
سلمت لك شرائك
بطلت شفعتها وان
قال لاجنبي سلمت
ذلك شراء هذه
الدار لم يكن
ذلك تسليما ولا تبطل
شفعة كذا في فتاوى
قاضي خان -

if the stranger should say to the pre-emptor, "I shall compound your claim for so many *dirhams*, as consideration on condition that you will surrender the right of pre-emption," and he did not say 'to me' or 'for me'; and the pre-emptor accepted the proposal, then the stranger is not liable for the consideration and the pre-emptor's right is also not annulled. And if the pre-emptor should say to the vendor, "I have surrendered to you your sale," or to the vendee, "I have surrendered to you your purchase," then his right of pre-emption will be annulled; but if he should say to a stranger, "I have surrendered to you the purchase of this house," then there will be no surrender, nor will the right of pre-emption become void. This is according to the *Fatāwā-i-Kāzī Khan*.

٨٦-تعليق ابطالها
بالشرط جائز حتى
لو قال سلمها
ان كنت اشتريت
لاجل نفسك فان
كان اشتراه بغيره
لا تبطل لانه استقطاع
والا سقط يحتسب
التعليق كذا في
الوجيز للكردوري -

86. The right of pre-emption may be lawfully suspended on a condition, e.g., if the pre-emptor says, "I surrender my right if you have purchased it for yourself," while the sale in fact, has been for another person, then the right of pre-emption is not extinguished; for its *Isgāt*, surrender, is suspended on a condition. This is according to the *Wajiz of-Kardari*. If the pre-emptor should say

لوقال الشفيع للبائع
سلمت لك الشفعة
ان كنت بعثها
من غلان لنفسك
فكان باعها لغيره
لم يكن ذلك تسليما
وفي فتاوى الفقيه
ابي الالبيث² اذا
قال الشفيع للمشتري
سلمت لك شفعة
هذه الدار فإذا
هو قد اشترتها
لغيره فهو على
شفعة وفي فتاوى
الفضلي ان هذه تسلية
للامر والمحظى
المذكور في فتاوى
ابي الالبيث هكذا
ذكر الصدر الشهيد
وثي الحاوي اذا
قال المشتري اشتريتها
لنفسه فسلم الشفيع
الشفعة ثم ظهر انه
اشترتها لغيره فال
محمد² بطلت شفعة
وقال ابو حنيفة²
لا تبطل كذا في
المحيط - وادا سلم
الجار الشفعة مع
قيام الشريك صلح
تسليمه حتى لو
سلم الشريك بعد

to the vendor, "I have surrendered the right of pre-emption for your sake, if you have sold the house to such and such person." While in reality the house has been sold to some one else, then it will not be a valid surrender. And it is mentioned in the *Fatāwā-i-‘Ābu Lais* that if the pre-emptor should say to the vendee, "I have surrendered the right of pre-emption in this house for you only," and the vendee had purchased the house for some one else, then the pre-emptor will retain his right of pre-emption, and it is mentioned in the *Fatāwā* of *Fazli* that this amounts to a surrender in favour of the principal. But the better opinion is the view expressed in the *Fatāwā-i-‘Ābu Lais*. And *Sadral-Shahid* says and it is also given in the *Havi* that if the vendee says to the pre-emptor, "I have purchased it for myself," and the pre-emptor surrenders his right, afterwards it transpires that the vendee had purchased it for somebody else, nevertheless *Imām Muhammad* holds that the pre-emptor's right has been rendered void, whereas *Imām Abu Hanifa* holds that it is not void. This is according to the *Muhīt*. And if the *shāfi‘-i-jar* has surrendered his right while there is a *shāfi‘-i-sharīk*, then such

ذلك شفعته لا يكُون
للحجار ان يأخذ
الشفعة كذا في
الذخيرة - وادا وجبت
الشفعة للعبد الماذون
فسلمها فهو جائز
ان كان عليه دين
او لم يكن عليه
دين وان سلمها
مولاه جاز ان لم
يكن عليه دين
وان كان عليه
دين لم يجز تسليم
المولى عليه كذا
في المبسوط - ولا
يجوز تسليمه بعد
الحجر كذا
في التناقر خانية -
وتسليم المكاتب
شفعة جائز ايضا
كذا في المبسوط -

a surrender is valid. So that, if thereafter the *shafī-i-sharīk* were to surrender his right, the *shafī-i-jār* cannot resume the right of pre-emption. This is according to the *Zakhira*. And when the right of pre-emption accrues in favour of a slave *mazun*,¹ and he surrenders his right, it is lawful, irrespective of the fact whether he were in debt or not. And if his master surrenders the right of pre-emption, then it will also be lawful provided the slave *māzūn* is not in debt, for if he were in debt, then the master's surrender will not be lawful as against the right of the slave to pre-empt the property.² This is according to the *Mabsūt*. And the surrender of the right by the slave after revocation of his freedom is not valid. This is according to the *Tātar Khāniyya* and similarly the surrender of his right of pre-emption by a slave *mukātib*³ is lawful. This is according to the *Mabsūt*.

¹ A slave permitted by his master to take part in the purchase and sale of things.

² It seems that it is profitable for the slave to pre-empt the property.

³ A slave who is entitled to purchase his freedom from his master at a stipulated sum.

٨٧ - ولو اخبر بالبيع بقدر من الثمن او جنس منه او من فلان فسلم ظهر خلافه هل يصح تسليمها فالاصل في جنس هذه المسائل ان ينظر ان كان لا يختلف غرض الشفيع في التسليم صح التسليم وبطلت شفعته وان كان يختلف غرضه لم يصح وهو على شفعة كذا في البداعي - ولو اخبر ان الثمن الف درهم مسلم ثم تبيين ان الثمن مائة دينار قيمتها الف درهم او اقل او اكثر فعندنا هو على شفعة ان كانت قيمتها اقل من الالف والا فتسليمه صحيح كذا في المبسوط - اذا قيل له ان المشتري

87. If the pre-emptor surrenders his right on misinformation as to the amount or the kind of the price, or the person to whom the property has been sold, it is to be considered whether his *gharaz*, object, would or would not have changed if he were correctly informed ; and if it would not have changed then the surrender will be valid, and the right will be extinguished, but if it would have changed, then the surrender will not be valid, and the right could still be claimed. This is according to the *Badāyi'*. If the pre-emptor be informed that the price is one thousand *dirhams*, and he therefore surrenders his right, subsequently he ascertains that it was one hundred *dinars*,¹ then he will be entitled to claim his right provided the value of one hundred *dinars* were less than that of one thousand *dirhams*; for if such is not the case, then the surrender will be deemed to be valid. This is according to the *Mabsūt*. If the pre-emptor be informed that the vendee is such and such a person, and he therefore surrenders his right, subsequently he ascertains that the vendee is a different person, then the right of

¹ A *dinar* is a gold coin, and a *dirham* is a silver coin.

فلان فسلم الشفعة
 ثم علم انه غيره
 فله الشفعة وادا
 قبل له ان المشتري
 زيد فسلم ثم علم
 انه عمر وزيد صحي
 تسلية لزيد وكان
 له ان يأخذ نصيب
 عمر و كذا في
 الجواهرة النيرة -
 ٨٨ - ولو اخبر
 ان الثمن الف
 فسلم فادا الثمن
 اقل من ذلك فهو
 على شفعته ولو كان
 الثمن الف او
 اكثر فلا شفعة
 كذا في الذخيرة -
 ولو اخبر ان
 الثمن شيء مما
 يكال او يوزن
 فسلم الشفعة فادا
 الثمن صنف آخر
 مما يكال او يوزن
 فهو على شفعته
 على كل حال سواء
 كان ماظهر مثل
 ما اخبره او اقل
 او اكثر من حيث
 القيمة كذا في
 المحيط -

pre-emption will revive. If the pre-emptor be informed that the vendee was A, thereupon he surrenders his right, but it turns out that A and B both had purchased it, then the surrender will be valid as regards the share of A, and the pre-emptor will be entitled to assert his right as regards the share of B. This is so according to the *Jawhara Nairah*.

88. And if the pre-emptor be informed that the price is one thousand *dirhams*, thereupon he surrenders his right; but subsequently he ascertains the price to be less, then the pre-emptor's right of pre-emption will revive; but if the actual price is ascertained to be one thousand *dirhams* or more, then the surrender of the right of pre-emption remains effective. This is according to the *Zakhira*. If the pre-emptor be informed that the price was a certain commodity estimated by weight or measure of capacity, and he thereupon surrenders his right, while in fact, the price was a different commodity estimated by weight or measure of capacity, then the right revives under all circumstances, whether the price was equal to or more or less than that mentioned to him. This is according to the *Muhīt*.

١٩ - ولو اخبر ان الثمن شيء من ذوات القيم فسلم ثم ظهر انه كان مكيلا او موزونا او اخبره ان الثمن الف درهم فادا هو مكيلا او موزون فهو على شفعته على كل حال كذا في خيانة المفتين -
 ولو اخبر ان الثمن شيء من ذوات القيم فسلم ثم ظهر انه شيء آخر من ذوات القيم بان اخبر ان الثمن دار فادا الثمن عبد فجواب محمد[ؐ] في الكتاب انه على شفعته من غير فصل قال شيخ الا سلام المعروف بخواهر زادة هذا الجواب صحيح فيما اذا كان قيمة ما ظهر اقل من قيمة ما اخبر به وغير صحيح فيما اذا كان قيمة ما ظهر مثل

89. And if the pre-emptor be informed of the price of a certain commodity, *Zawātul Qiyam*, and thereupon he surrenders his right, when in fact, it turns out to be a commodity estimated by weight or measure of capacity, then under all these circumstances, his right to pre-empt revives. This is according to the *Khizanat-al-Mustīn*. And if the pre-emptor be informed of the price of a commodity *Zāwatul Qiyam*, and he surrenders his right, when in fact, it turns out to be a different commodity *Zawātul Qiyam*, e.g., he was told that the price was a mansion, while in fact, it was a slave, then according to Imām Muhammad the pre-emptor retains his right. Shaikh Islām-ul-Khwāhir Zāda says that this view of Imām Muhammad is accepted in the case where the price is proved to be less than that was told to the pre-emptor; but the view is not accepted, if the price turns out to be equal to that which was told to the pre-emptor or more than that. And if the pre-emptor be informed that the price is a slave of the value of one thousand *dirhams*, or something, *Zawātul Qiyam*, and in

¹ *Zawātul Qiyam* means things having some value.

قيمة ما اخبر به او
أكثر ولو اخبار
الثمن عبد قيمته
الف او ما اشبه
ذلك من الاشياء
التي هي من ذات
القيم ثم ظهر ان
الثمن دراهم او دنانير
فجواب محمد^{رض} انه
على شفعة من غير
فصل وبعضاً مشائخنا^{رض}
قالوا هذا الجواب
محمول على ما
اذا كان ما ظهر
اقل من قيمة ما اخبر
ما اذا كان مثل
قيمة ما اخبروا اكتر
فلا شفعة له ومنهم
من قال هذا
الجواب صحيح
علي الا طلاق
بخلاف المسئلة
الأولى ولو اخر
ان الثمن عبد
قيمتها الف ظهر
ان قيمتها اقل من
الالف فله الشفعة
وان ظهر ان قيمتها
الف او اكتر فلا
شفعة ولو اخر

fact the price was in *dirhams* or *dinars* then the view of Imām Muḥammad, viz., that the pre-emptor retains his right of pre-emption is correct. And some of our jurists hold that this view of Imām Muḥammad is applicable to a case where the price turns out to be less than that which was told to the pre-emptor; but if the price happens to be equal or more than what was told to the pre-emptor, then this view is not applicable, however, some jurists hold that even in this case this view will be applicable. And if the pre-emptor be informed that the price is a slave of the value of one thousand *dirhams*, when in fact, it was less than one thousand *dirhams*, then the pre-emptor retains his right; but if the price was actually one thousand *dirhams* or more, then the right will be annulled. And if the pre-emptor be informed that the price is one thousand *dirhams*, whereupon he relinquishes his right, when in fact, it turns out that the price was a commodity, *Zawātul Qiyyam*, then relinquishment is valid except where the value of the commodity is proved to be less than one thousand *dirhams*. This is according to the

ان الثمن الف
 وسلم ثم ظهر ان
 الثمن شيء من
 دولت القيمة فلا
 شفعة له الا اذا
 كار قيمة الثمن
 اقل من قيمة الف
 درهم كذا في
 الصحيح - ولو اخبر
 بشراء نصف الدار
 وسلم ثم ظهر
 ان المشتري اشتري
 الكل فله الشفعة
 ولو اخبر بشراء
 الكل وسلم ثم
 ظهر انه اشتري
 النصف فلا شفعة
 له قال شيخ
 الاسلام في شرحة
 هذالجواب ملحوظ
 على ما اذا كان
 ثمن النصف مثل
 ثمن الكل بان
 اخبر انه اشتري
 الكل بالف وسلم
 ثم ظهر انه اشتري
 النصف بالالف اما
 اذا اخبر انه اشتري
 الكل بالف ثم
 ظهر انه اشتري
 النصف بخمسيناتة
 يكون على شفعة
 هكذا في الذخيرة -

Muhit. If the pre-emptor be informed of the sale of half the mansion, and thereupon surrenders his right, whereas in fact, the vendee has purchased the whole mansion, then the right of pre-emption will revive; but if the pre-emptor be informed of the sale of the whole mansion, and thereupon relinquishes his right, whereas, in fact, the vendee had purchased only half the mansion, then the relinquishment will remain valid. But Shaikh al Islām has said in his *Sharha* that this view will be applicable if the price of half the mansion were the same, e.g., the pre-emptor is informed that the vendee purchased the whole mansion for one thousand *dirhams* thereupon he surrenders his right, whereas, the vendee had purchased only half the mansion for one thousand *dirhams*, then in this case the relinquishment remains valid; however if the pre-emptor be informed that the vendee purchased the whole for one thousand *dirhams*, and it turned out that he purchased the half for 500 *dirhams*, then the right of pre-emption will revive. This is according to the *Zakhira*.

٩٠- ولو سلم الشفعة
 في النصف بطلت
 في الكل ولو طلب
 نصف الدار بالشفعة
 هل يكون ذلك
 تسليماً منه للشفعة
 في الكل اختلف
 فيه أبو يوسف
 ، محمد[ؑ] قال
 أبو يوسف[ؑ] لا يكون
 تسليماً كذا في
 البدائع وهو الأصح
 لأن طلب التسليم
 النصف لا يكون
 تسليماً للباقي لا
 صريحاً ولا دلالة
 كذا في محيط
 السرخسي - ولو ان
 الشفيع باع نصف
 داره او ثلثها او
 اكثر من ذلك بعد
 ان يبقي منها شئ
 وما باع شائعاً فله
 الشفعة بما يبقي كذا
 في السراج الوهاج -

90. And if the pre-emptor relinquishes his right of pre-emption in half the mansion, then his right is annulled in the whole. If the pre-emptor claims half the mansion in pre-emption, then whether it is to be regarded as the surrender by him of his right of pre-emption in the whole mansion or not is held differently by Imām Abu Yusuf and Imām Muḥammad,¹ the former holds that it does not amount to surrender of the right in the whole mansion. This is according to the *Badāyi'*. And the view of Imām Abu Yusuf is better because the demand of the right of pre-emption in half the mansion, does not amount either expressly or by implication to surrender of the right by the pre-emptor in the remaining half of the mansion. This is according to the *Muhīt* of *Sarakhsī*. And if the pre-emptor has sold half the mansion by reason of which he claims pre-emption, or one third of it or more, but some portion of it still remains with him, then he retains his right of pre-emption by reason of this remaining portion. This is according to the *Sirajat-Wahhāj*.

¹ The view of Imām Muḥammad seems to be followed by the Indian High Courts, but they do not refer to his authority at all.

٩١ - الشفيع
 اذا ادعى رقبة الدار
 المشفوعة اذها له
 لا بالشفعة تبطل
 شفعته وان طلب
 الشفعة ثم اوى
 رقبة الدار المشفوعة
 اذها له لاتنسع دعراة
 كذا في فتاوى
 قاضيكان - وان
 صالح من شفعته على
 عوض بطلت الشفعة
 ورد العوض لأن
 حق الشفعة ثبت
 بخلاف القباس
 لدفع الضرر فلا
 يظهر ثبوته في حق
 الا عتراض ولا يتعلّق
 اسقاطه بالجائز من
 الشرط في الفاسد
 اولى فلو قال الشفيع
 اسقطت شفعتي فيما
 اشتريت على ان
 تسقط شفعتك فيما
 اشتريت فانه تسقط
 شفعته وان لم يسقط

91. If the pre-emptor claims the ownership of a certain mansion subject of pre-emption to be his own property, then there exists no right of pre-emption and if he has demanded pre-emption, thereafter he claims the mansion to be his own property, then his suit can not be decreed.¹ This is according to the *Fatawa-i-Kazi Khan*. If the pre-emptor has compounded his right for something 'iwaz, then the right is void, and the 'iwaz the subject of exchange must be returned; because the right of pre-emption is allowed with a view to avoid injury and therefore it is construed strictly by the doctrine of *Qias*. And further, the *Isqat* of *Shuf'a*, the surrender of the right of pre-emption, cannot be suspended on a condition, even though the condition were lawful; e.g., If the pre-emptor says to the purchaser, 'I will waive my right of pre-emption in the house that you have purchased if you will waive your right of pre-emption in the house that I have purchased,' now if the pre-emptor waives his right of pre-emption

¹ It is however possible to make an alternative claim of ownership in the suit of pre-emption.

المشتري شفعته فيما اشتري الشفيع و استقطاع الشفعة بالعوض المالي شرط فاسد لانه غير ملائم لانه اعتيادي عن محظوظ الحق في المحل وهو حرام ورسوة هكذا في الكافي -

٩٢ - وإن كان الشفيع شريكًا وجاراً فباع نصيحة الذي يشفع فيه كان له أن يطلب الشفعة بالجوار كذا في البدائع - سئل أبو بكر^{رض} عن سلم علي المشتري ثم طلب الشفعة قال تبطل شفعته كذا قال ليث بن مشاور قال إبراهيم بن يوسف^{رض} لا تبطل روي عن محمد^{رض} وبه نأخذ كذا في الحاوي للفتاوى - وهو المختار كذا في الخلاصة والمضمرات -

while the purchaser does not do so on his part in respect of the property purchased by the pre-emptor, then the pre-emptor loses his right, because the *Isqāt* of *Shufa'* in lieu of exchange of property was a *fāsid*, invalid condition, and similarly it would be much more so if the condition were unlawful, *Harām*, condemnable. This is according to the *Kāfi*.

92. If the pre-emptor were both a *sharik* (partner) and a *jar* (neighbour) and he sells the share by reason of which his right in the *sharik*'s capacity could be established, nevertheless he may enforce his claim of pre-emption on the ground of neighbourhood. This is according to the *Badayi'*. Shaikh Abu Bakr was asked about the case of a pre-emptor who saluted the vendee and thereafter claimed his right of pre-emption; he replied, that thereby the right was annulled, and a similar view is held by Lais ibn Mushāwir. But Ibrahim bin Yusuf observes that the right of pre-emption is not extinguished, as held by Imām Muhammad, and is accepted by all of us. This is according to the *Hāwi*, and is the best view, it is also according to the *Khulāsa* and *Muzmarāt*.

ولو كان المشتري واقفا مع الابن فسلم الشفيع على ابن المشتري بطلت شفعته بخلاف ما اذا سلم علي المشتري فان سلم علي احد هما بان قال السلام عليك ولا يدرى علي من سلم سئل الشفيع انه سلم علي الاب او علي الاب فان قال علي الاب لا تبطل شفعته وان قال علي الاب تبطل شفعته وان اختلاف قال المشتري سلمت علي ابني وقد بطلت شفعتك وقال الشفيع سلمت عليك فالقول قول الشفيع كذا في الذخيرة - ولو اخبر ببيع الدار فقال الحمد لله فقد ادعى شفعتها او سبحان الله فقد ادعى شفعتها فهو على شفعته في رواية محمد كذا

However if the vendee was standing with his son besides him, and the pre-emptor salutes first the vendee's son, then his right will be extinguished, whereas if he had saluted the vendee, he will retain his right; but if he salutes thus saying "*As-salām A'laikum*" (Peace be on you) and it is not known whom he saluted, then the pre-emptor should be asked whether he saluted, the son or the father and if he says 'the father', his right is not annulled; but if says 'the son' then his right is annulled. And if the pre-emptor and the vendee disagree, and the vendee says, "You saluted my son, and therefore you have lost your right"; while the pre-emptor says, "I saluted you," then the words of the pre-emptor will be accepted. This is according to the *Zakhīra*. And if the pre-emptor is informed of the sale of a mansion, and he said, "God be praised, I claim pre-emption," or he said, "Glory to God, I claim pre-emption," then according to the reports of Imām Muhammad, the pre-emptor retains his right of pre-emption. This is according to the *Badāyi'*. Hence if the pre-emptor having heard of the sale, says, "God be praised I claim pre-emp-

في البدائع - سمع
البيع فقال الحمد لله
قد طلبت شفعتها
لاتبطل في المختار
كذا في الو جيز
للكردي - و قال
الناطقي على قياس
قوله سبحانه الله
او كيف اصبت او
كيف امسيت اذا
قال للمشتري حين
لقيه اطال الله
بقائقك ثم طلب
الشفعة لا تبطل
شفعتها كذا في
الظهورية وكذلك
لو قال (شفعة مراسلة
خوا ستم وباقتم)
 فهو على هذا
كذا في الذخيرة -
لو سالة عن
حوالته او عرض
عليه حاجة ثم طلبت
بطلت شفعتها
وان سالة عن
شمنها فاخبره به ثم
طلبه باطلت شفعتها
كذا في المضرات -

tion," then his right will not be annulled according to the approved view. This is according to the *Wajiz of Kardarī*. And *Nātīfī* says that if the pre-emptor's words, 'Glory to God' or '*Kaifa Ashbata*' ("How do you do?", "How are you?") are followed by such words as ("May God prolong your life"), and then he claims pre-emption, then his right will not become void. This is according to the *Zahiriyya*. And similarly if he says "Preemption is mine, and I desire it and obtain it," then also the right continues. This is according to the *Zakhīra*. And if the pre-emptor mentions before the vendee his own needs, or brings to his notice any of his wants, and then demands pre-emption, his right will be annulled. And if he enquires from the vendee about the price of the subject of pre-emption, and on being informed of it demands pre-emption, then his right is extinguished. This is according to the *Muzmarāt*.

٩٣ - دار بيعت
 فقال البائع او
 المشتري للشريك
 ابشرأنا عن كل
 خصومة لك قبلنا
 فعل وهو لا يعلم
 انه يحب لـه قبلهما
 شفعة لا شفعة له
 في القضاء وله الشفعة
 فيما بينه وبين
 الله تعالى ان كان
 بحال لو علم بذلك
 لا يبرأها كذا في
 المحيط ولو اخبر
 بالبيع وهو في
 الصلوة ثم خرى فيها
 فان كان في الفرض
 لا تبطل شفعته وكذا
 اذا كان في الواجب
 وان كان في السنة
 فكذلك لأن هذه
 السنن الرببة في
 معنى الواجب سواء
 كانت السنة ركعتين
 او اربعاء كالرابع
 قبل الظهر حتى
 لو اخبر بعد ما
 صلى ركعتين
 فوصل بهما الشفعة

93. If some property is sold, and then either the vendor or the vendee says to the pre-emptor, "Release us from a certain right of litigation that you have against us," and if the pre-emptor does so even while he is ignorant about the sale and about his right of pre-emption, then his right will be legally annulled, but it survives (morally) before God, provided the pre-emptor would not have released his right had the true facts were brought to his notice. This is according to the *Muhīt*. And if the pre-emptor is informed of the sale while he is praying, and he finishes his prayers, then his right of pre-emption will not be extinguished, provided he was offering *farz* (compulsory) prayers, and the same holds good in the case of *wājib* (obligatory) prayers, and if he were saying *sunnat* prayers at that time, then his right will still survive, because *sunnat rātiba* is deemed to occupy the same position as *wājib* prayers, it is immaterial whether *sunnat* prayers were of two *rak'ats* or of four, e.g. the four *rak'ats sunnat* of *Zuhr* prayer. If when he is informed of sale, he had finished two *rak'ats*

الثاني لم تبطل
شفععة لا ذهبا بمنزلة
صلوة واحدة واجبة
كذا في البدائع -
في فتاوى أبي
البيث^٢ وفي
واقعات النا طفي
إذا علم بالبيع
وهو في التطوع
فجعلها أربعا
اوستنا فعن محمد^٣
لا تبطل شفعته قال
الصدر الشهيد
والمحترر انه تبطل
لأنه غير معذور كذا
في الذ خيرة، المحيط
والمحمرات والكبرى -
وفي فتاوى أنهوا أخبار
وقت الخطبه فلم
يطلب حتى فرغ الإمام

and then he finished the remaining two, his right will not be annulled, because here each of the two *rak'ats* is counted as a single prayer. This is according to the *Badāyi'*. In the *Fatāwā-i-Abu-Lais* and the *Waqyāt Nātfqī* it is mentioned that if a pre-emptor is informed of the sale at the time of his offering *Tatāwa'* prayers, thereafter he finishes two, four, or six *rak'ats* as the case might be, then according to Imām Muḥammad his right of pre-emption is not annulled, but Shaikh Sadr Shahīd holds and is also the accepted view, that the right of pre-emption is annulled, on the ground that the pre-emptor's act is not excusable. This is according to the *Zakhīra*, in the *Muhīt*, and the *Muzmarāt-al-Kubrā*.^١ And in the *Fatāwā Ahū* it is mentioned that if the pre-emptor was hearing the *khutba* sermon, from the pulpit

^١ The Muslim service consists of two parts, the *farz*, compulsory prayer, and the *sunnat*, the prayers according to the traditions of the Prophet. The *Farz* prayers are as follows : the *farz* morning prayers 2 *rak'ats*, the *zuhr* early afternoon prayers 4 *rak'ats*, the 'Asr late afternoon prayers 4 *rak'ats*, the *maghrīb* evening prayer at sunset 3 *rak'ats* and the 'Isha' night prayer 4 *rak'ats*; the *sunnat* prayers are said along with the *farz*; the *nafil* or *tatāwa'* prayers are not obligatory.

من الصلوة ان
كان قريبا بحيث
يسمع الخطبة لا
تبطل والا ففيه
اختلاف المشائخ
ولو اخبره بعد ما
كان قعدة الاخرية
فلم يطلب حتى
قرأ الدعوات الى
قوله ربنا آتنا في
الدنيا والدين
حسنة ثم سلم
بطلت كذا في
التقاض خانية - في
الفصل الحادي عشر
فيما تبطل شفعة -
و في النوازل اذا
اراد ان يفتتح
الصلوة مع الامام
بجماعه فلم يذهب
في طلبها تبطل
شفعته كذا في
التقاض خانية في
فصل الثالث عشر في
طلب الشفعة -

when he was informed of the sale, and he did not demand pre-emption until the Imām finished the *khutba*, then his right of pre-emption will not be annulled, provided he was sitting so near to the Imām that he could actually hear *khutba*, otherwise on this point different views are held by the jurists. If the pre-emptor is informed of the sale at the last sitting of the prayer, and he did not demand pre-emption till he finished the *Du'a* by uttering '*Rabbana*, etc.', thereafter uttered *salām*, then his right would become extinguished. This is according to the *Tātār khāniyya* (Chapter XI) describing the circumstances in which the right of pre-emption is rendered void. And it is stated in the *Nawāzil* that if the pre-emptor is informed of the sale when he is about to join the *jamā'at* congregation, and he does not demand pre-emption, then his right is annulled. This is according to the *Tātār khāniyya* (Chapter XIII) entitled the Demand of Pre-emption.

¹ *Du'a*, is not the essential part of the prayer, *Du'a* is seeking the help of God for oneself, while '*salāt*' is the ritual prayer meant for God alone.

الباب العاشر

في الاختلاف الواقع
بين الشفيع
والمشتري والبائع
الشهادة في الشفعة

٩٣ - الاختلاف
الواقع بين الشفيع
المشتري اما ان
يرجع الي الثمن
واما ان يرجع الي
المبيع اما الذي
يرجع الي الثمن
فلا يخلو اما ان
يقع الاختلاف في
جنس الشمن واما
ان يقع في قدرة
واما ان يقع في
صفته فان وقع في
الجنس بان قال
المشتري اشتريت
بمائتين دينار و قال الشفيع
بالف درهم فالقول
قول المشتري لأن
المشتري اعرف بجنس
الثمن من الشفيع
فيرجع في معرفة

CHAPTER X

OF DIFFERENCE AS REGARDS THE
EVIDENCE BETWEEN THE PRE-EMPTOR,
THE VENDEE, AND THE VENDOR.

94. If the vendee and the pre-emptor differ as to matters of fact, the difference will be with reference either to the price or the property to be pre-empted. If it is as regards the price, it must be in respect of its kind, quantity or quality. When the difference is as to the kind of the price, e.g., the vendee says "I purchased it for 100 *dinars*," and the pre-emptor says, "No, it was for 1000 *dirhams*," then the word of the vendee should be preferred for he must obviously be better acquainted with the price than the pre-emptor. This is according to the *Badāyi'*. When the difference is as to the price itself, the word of the vendee is again preferred, and they need not take the oath. And if they both adduce proof, then according to Imām Abu Ḥanifa and Imām Muḥammad

الجنس عليه كل في
البائع وإذا اختلف
الشفيع والمشتري
في الثمن فالقول
قول المشتري ولو
يتحقق الفان ولو اقاما
الشفيع عند أبي حنيفة
البينة غالبية بيته
، محمد^ح قال أبو
يوسف^ح البينة بيته
المشتري وإذا ادعى
المشتري ثمناً وادعى
البائع أقل منه
ولم يقبح الثمن
أخذها الشفيع بما
قال البائع وكان
ذلك حطا عن
المشتري ولو ادعى
البائع أكثر يتحقق الفان
ويترافقان و أيهما
تكل ظهر ان الثمن
ما يقوله الآخر
فيأخذها الشفيع
 بذلك وإن حلفا
يفسح القاضي البيع
بينهما ويأخذها
الشفيع بقول البائع
وان كان قبض
الثمن أخذها بما
قال المشتري إن

preference is given to the evidence of the pre-emptor, though according to Imām Abu Yusuf the proof of the purchaser should be preferred. If the vendee offers a certain price, but the vendor takes less than that, he being still unpaid, then the pre-emptor may take the property at the price received by the vendor, and the abatement in the price is deemed as a reduction made, as if by the vendor in the original price. However, if the vendor demands more than the original sale-consideration from the vendee, then they should both take the oath, and if either of them refuses to swear, the price is to be taken as stated by the other, while if they both take the oath, the sale is to be cancelled as between them, and the pre-emptor if he desires may take the property, at the price stated by the vendor, without any regard to that mentioned by the vendee. And if it is not known whether the price has been paid or not, but the vendor says, "I sold it for a 1,000 *dirhams* and have received payment," then the pre-emptor may take the property for 1000 *dirhams*, while if the vendor should say, "I have received the price, and it is 1,000

شاء ولم يلتفت
إلى قول البائع
ولو كان نقد الثمن
غير ظاهر فقال
البائع بعث الدار
بالف وقبضت الثمن
فاخذها الشفيع
بالف ولو قال
قبضت الثمن وهو
الف لم يلتفت إلى
قوله كذا في
الهداية - ولو اشتري
أداً بعرض ولم
يتقابضاً حتى
هلك العرض وانتقض
البيع فيما بين
البائع والمشتري
او كان المشتري
قبض الدار ولم
يسلم العرض حتى
هلك او انتقض
البيع فيما بين
البائع والمشتري
وبقي للشفيع حق
الشفعه بقيمة العرض
ثم اختلف البائع
والمشتري في قيمة
العرض فالقول قول
البائع مع يمينه
فإن أقام أحدهما
بينته قبلت بيته
 وإن أقاما جميعا
البينة فالبنية بيته
البائع عند أبي
يوسف² و مسلم

then no attention should be paid to this (ambiguous) statement. This is according to the *Hidāya*. If the difference is as regards the quality of the price, e.g., a person purchases a mansion in lieu of chattels and possession is not yet interchanged, Meanwhile the chattels perish, and it results in the cancellation of the transaction between the vendor and the vendee, nevertheless the pre-emptor is entitled to pre-empt the mansion at the value of the chattels; now if the vendor and vendee differ as to their value, the word of the vendor on oath should be preferred. But if either party produces evidence, then the proof should be accepted; while if they both tender proof, then preference should be given to that of the vendor; this is the view of Imām Abu Hanifa and Imām Muḥammad and the same view is held by Imām Abu Yusuf. But if the vendee has destroyed the building, then a proportionate price should be deducted from the original sale-consideration in favour of the pre-emptor. And if they both differ as to the price of the building, and are agreed as to the price of the site being 1,000 *dirhams*, or they both differed

وهو قول أبي حنيفة² ولو هدم المشتري بناء الدار حتى سقط عن الشفيع قدر قيمة ثمن العثمان ثم اختلفا في قيمة البناء واتفقا على أن قيمة الساحة إنما هي قيمة البناء الف أو اختلفا في قيمة البناء والساحة جميعاً فان اختلفا في قيمة البناء لا غير فالقول قول المشتري مع يمينه وإن اختلفا في قيمة البناء والساحة فلن الساحة تقوم والقول في قيمة البناء قول المشتري فان قامت لأحدهما ببيته قبلت وإن أقاما جميعاً البينة قال أبو يوسف³ البينة بينة الشفيع على قياس قول أبي حنيفة² وقال محمد⁴ البينة بينة المشتري على قياس قول أبي حنيفة² وإن اختلفا في صفة العثمان بان قال المشتري اشتريت بثمن معجل وقال الشفيع لا بل اشتريته بثمن موجل

as to the price of both the building and the site, then if they differed only as to the value of the building the words of the vendee on oath should be preferred, and if they differed as to the value of the building and the site then the value of the site should be ascertained, and the word of the vendee on oath as to the value of the building will be preferred, and if either party tenders evidence, then it should be accepted, and if both adduced proof, then Imām Abu Yusuf says, that according to *Qias* based on the view of Abu Hanifa, the proof of the pre-emptor will be preferred, while Imām Muhammad holds that according to *Qias* based on the view of Imām Abu Hanifa the proof of the vendee will be accepted. And if they differed as to the quality of the price, e.g., the vendee says "I have purchased for ready money," and the pre-emptor says, "No you have purchased it on credit," then, the word of the vendee should be accepted. If the difference relates to the thing sold, that is, whether the sale took place by one transaction or two transactions, e.g., a mansion has been purchased, and the purchaser says, "I bought the site separately for

فالقول قول المشتري
واما الذي يرجع
الي المبيع فهو
ان يختلف فيما
وقع عليه البيع
انه وقع عليه
بصفة واحدة ام
بصفتين نحو ما
اذا اشتري دارا
فقال المشتري
اشترت العرصة على
حدة بالف وقال
الشفيع بل اشتريتهما
جميعا بالقيمين فالقول
قول الشفيع وايرهما
اقا ما البينة قبلت
وان اقاما جميعا
البينة ولم يوقتا وقتا
فالبينة ببينة المشتري
عند ابي حنيفة²
وابي يوسف² وعند
محمد² رجل البينة
بينة الشفيع هكذا
في البدائع -

٩٥ - وفي المتنقى
بن سعادة عن
محمد² رجل اشتري
من رجل دارا
ولها شفيعان

1,000" and the pre-emptor says, "No, you bought them both for 2,000" then the word of the pre-emptor on oath is to be preferred; and if either of them tender evidence, then that should be accepted, and if they both adduce proof together, without specifying any time, the proof of the vendee should be preferred, according to Imām Abu Ḥanifa and Imām Yusuf, but that of the pre-emptor according to Imām Muḥammad. This is according to *Badāyi'*.

95. It is stated in the *Muntaqā* of Ibn Samā'a, and the report is taken from Imām Muḥammad that if a person purchases a house and it has two pre-emptors and one of them comes to the purchaser

فأتيَ إليه أحدُهُما
بطلب شفعته و قال له
المشتري أني اشتريتها
بالف فصدقه الشفيع
في ذلك وأخذها
بالف ثم إن الشفيع
الثاني جاء فقام
بينته أن المشتري
كان اشتراها بخمسة
فالشفيع الثاني
يأخذ من الشفيع
الأول نصفها و يدفع
إليه مائتي درهم
و خمسين و يرجع
الشفيع الأول على
المشتري بمائتي
درهم و خمسين
و بقي في يد الشفيع
الأول نصف الدار
بخمسة و فيها ايضا
رجل اشتري من
رجل دارا و قبضها
فحاج الشفيع فطلب
الشفعة فقال المشتري
اشتريتها بالفرين
وقال الشفيع لا بل
اشترىت بالف ولم
يكن للشفيع بينة
و حلف المشتري على
ما ذكر وأخذ

to demand pre-emption, and the purchaser says, "I have purchased this house for 1,000 *dirhams*," thereupon the pre-emptor after ascertaining the truth of his statement purchases it for 1,000 *dirhams*, thereafter the other pre-emptor appears and adduces proof that the purchaser had purchased it for 500 *dirhams*, then he (the second pre-emptor) is entitled to pre-empt the house for 250 *dirhams* from the first pre-emptor, and the first pre-emptor should recover back from the purchaser 250 *dirhams*, and the first pre-emptor will retain half the portion of the house in lieu of 500 *dirhams*. And it is also mentioned in the *Muntaqā* that if a person purchases a house from another person and takes possession of it, and thereafter the pre-emptor claims pre-emption, then the purchaser says, "I have purchased it for 2,000 *dirhams*" and the pre-emptor said "Nay, you have purchased it for 1000" and the pre-emptor has no proof and the purchaser makes the statement on oath, thereupon the pre-emptor pre-empted the house for 2,000 *dirhams*. Later on, another pre-emptor appears and he adduces proof against the first pre-emptor.

الشفيع بالفي درهم
 ثم قدم شفيع
 آخر فقام بيته
 على الشفيع الاول
 ان البائع كان
 باع هذه الدار
 من فلان بالف فانه
 يأخذ نصف الدار
 بخمسة ويرجع
 الشفيع الاول على
 المشتري بخمسة
 حصة النصف الذي
 اخذه الشفيع الثاني
 ويقال للشفيع الاول
 ان شئت اعد البينة
 على المشتري
 من قبل النصف
 الذي في يديك
 والا فلا شيء لك
 ومعنى المسئلة ان
 الشفيع الاول لو قال
 للمشتري ان الثاني
 اثبت باليته ان
 الشراء كان بالف
 فيكون بمقابلة
 النصف الذي
 في يدي خمسة
 على ان ارجع
 عليك بخمسة
 ليس له ذلك الا
 اذا عاد البينة
 ان الشراء كان
 بالف لما اشار
 اليه في الكتاب
 ان الشفيع الثاني
 اذما يستحق البينته

that the seller sold the house to the purchaser for 1,000 *dirhams*, then the second pre-emptor will take half the house for 500 *dirhams*, and the first pre-emptor will recover 500 *dirhams* from the purchaser, but he will be asked to tender evidence on this issue again otherwise he will get nothing. The problem simply means that if the first pre-emptor says to the purchaser, "The second pre-emptor has adduced proof that the house was purchased for 1,000 *dirhams* and hence, I claim 500 *dirhams* from you for half of my possession," then he will not be entitled to it; but if he adduces substantial proof the second time that the sale actually had taken place for 1,000 *dirhams*, then he will be entitled to claim 500 *dirhams* from him. This is so according to the reference in the Book *Muntaqā* that the second pre-emptor is entitled to half of the house only by reason of his proof, and this means that the proof of the second pre-emptor was admissible in each case, i.e., now the sale has been established for 1,000 *dirhams* in respect of that half to which the second pre-emptor is entitled but not in respect of the other half which is

نصف الدار معناه
ان بينة الشفيع
الثاني لما عمل
في نصف الدار
يثبت الشراء بالف
في حق ذلك
النصف الذي
استحقه الشفيع
الثاني لا في حق
النصف الذي في
يد الشفيع الأول
فيحتاج الشفيع
الأول الى اعادة
البينة ليثبت الشراء
بالالف في النصف
الذي في يديه
فيستحق الرجوع
علي المشتري
بالخمسينية الرائدة
كذا في المحيط -
وفي الفتاري العتابية
 ولو اشتري ١٥٠ را
فحاجه الشفيع
فاخذها بالف درهم
من المشتري بقوله
ثم وجد بيته ان
المشتري اشترى ها
بخمسينية قبلت
بيته ولو صدق
المشتري او لا في بيته
على خلاف ذلك لا
تقبل كذا في التأثار
خانية -

٩٤ - اتفق البائع
والمشتري ان البيع

F. 28

in the possession of the first pre-emptor, and hence the first pre-emptor must adduce proof in order to establish the sale for 1,000 *dirhams* with reference to his half of the house also, and then he will be entitled to recover 500 *dirhams* from the purchaser. This is according to the *Muhīt*. It is mentioned in *Fatawa-i-Itabiyya* that if a person purchases a house, thereafter the pre-emptor pre-empts the house for 1,000 *dirhams* from the purchaser accepting his word, later on he found proof that the purchaser had bought it for 500 *dirhams* then his proof will be accepted, but if the pre-emptor had already ascertained about this matter before he pre-empted it then further proof cannot be accepted. This is according to the *Tātar Khāniyya*.

96. If the seller and the purchaser are agreed that the sale took place with

كان بشرط الخيار
للبائع وانكر الشفيع
فالقول قولهما في
قول أبي حنيفة و
محمد واحدي
الروایتین عن
ابي يوسف² ولا
شفعۃ للشفیع
لأن البيع ثبت
باقرارهما و
انما ثبت على الوجه
الذي اقر به وفي
الجامع اذا ادعى
البائع الخيار
و انكر المشتري
والشفیع ذلك فالقول
قول المشتري
استحساناً لأن
الخيار لا يثبت الا
بالشرط والبائع
يدعي احداث
الشرط والمشتري
نيكر وكذا لو ادعى
المشتري الخيار
فانكر البائع والشفیع
ذلك فالقول قول
البائع ويأخذ
الشفیع كذلك
في المحيط -
رجلان تباعا
فطلب الشفیع
الشفعۃ بحضورهما
فقال البائع كان
البيع بيننا بيع
معاملة وصداقة

an option for the seller, while the pre-emptor denies it, then according to the view of Imām Abu Ḥanifa and Imām Muḥammad and one of the reports of Imām Abu Yusuf their words will be accepted and the pre-emptor will not be entitled to pre-emption, because the sale can only be established on the agreement of the vendor and the vendee, and it is this that they admit. According to the *Jāmi'* if the seller claimed the option but the purchaser and the pre-emptor denied it, then according to the doctrine of *Istihsān* the word of the purchaser will be preferred, because the option is not established unless it is stipulated, and similarly if the purchaser claims the option while the seller and the pre-emptor deny, then the word of the seller will be preferred, and the pre-emptor will be entitled to pre-empt. This is according to the *Muhīt*. Two persons sell and purchase from one another, and the pre-emptor claimed pre-emption in the presence of both of them, thereupon the seller says, "It was only a contract for sale between us, and not the actual sale," and the purchaser confirms it,

المشتري على ذلك
لا يصدقان على
الشفيع بل القول
لمن ادعى جوازة
الا اذا كان الحال
يدل عليه بان كان
المبيع كثير القيمة
وقد بيع بثمن قليل
لا يباع به مثلك
فحينئذ يكون
القول لهم ولا شفعة
للشفيع كذا في خزانة
المفتين في المتنقى
باع دارا من رجل
ثم ان المشتري
والبائع تصادقا
ان البيع كان فاسدا
وقال الشفيع كان
جائز فالقول قول
الشفيع ولا اصدقاهما
على فساد البيع
في حق الشفيع
بشهي ولو ادعا
احد هما و انكر
آخر اجعل القول
فيه قول الذى
يدعى الصحة
فاذا زعم ان البيع
كان فاسدا بشهي

then the word of both of them will not be accepted as against the pre-emptor, but the word of the pre-emptor who affirms the validity of the sale will be preferred, but it will not be accepted if the facts are actually proved to be the same as the purchaser and the seller had represented, e.g., if some valuable property had been sold for a small amount and things of such value are not so cheaply sold, then the statement of the seller and buyer will be accepted, and the pre-emptor will not be entitled to pre-emption. This is according to the *Khizanatul Muftin*. According to the *Muntaqā* if a person sells a house to another person, and the purchaser and the seller admit that the sale was an invalid, *fasid* sale, but the pre-emptor asserts that it was a valid sale, then the word of the pre-emptor will be preferred, and the statements of the seller and the purchaser about the invalidity of sale will not be accepted ; but if one of them asserts the invalidity of the sale, while the other denies it, then we should accept his statement who claims the sale to be valid. And if they are agreed that the sale was invalid, and give the same reason establishing invalidity of the sale,

اجعل القول فيه
قول من يدعى
الفساد فاني اصدقهما
ولا اجعل للشفيع
شفعة يريد
بهذا ان البائع
مع المشتري اذا
اتفقا على فساد
البيع بسبب لو
اختلف البائع
والمشتري فيما
بينهما في فساد
العقد بذلك السبب
لا يصدق فالقول
قول من يدعى
الجواز ذكره ان
يدعى احد هما
اجلاساً او خياراً
فاسداً فإذا اتفقا
على الفساد بذلك
السبب لا يصدق قان
في حق الشفيع
وإذا اتفقا على
فساد البيع بسبب
لو اختلفا فيما
بينهما في فساد
البيع بذلك
السبب كان القول

we will then accept the word of both of them, and the pre-emptor cannot pre-empt; by this it is meant that if the seller and the purchaser agree as to the invalidity of sale for some reason for which if the seller and the purchaser differed, among themselves as to the invalidity of sale for that cause, then it is not verified and we will accept the statement of the one who claims validity of sale, as for instance one of them claims that the sale was subject to an option, and they thus both agree as to the invalidity of sale on account of this reason, then their words cannot be accepted as against the pre-emptor. But if they both have agreed as to the invalidity of sale and give such reasons, that if they had differed the word of the person who claims the validity of sale would be accepted, then their words will also be accepted as against the pre-emptor.¹ This case is so illustrated in the *Muntaqā*, e.g., if the purchaser says to the seller, "You sold this house to me for 1,000 *dirhams* and one *rattl*² of wine" and the seller says, "Thou art right," then the Court shall not

¹ Some of the illustrations explain these passages more fully.

² A *rattl* is equivalent to 480 *dirhams* or a pound weight or a pint measure (Lanes' Arabic English Lexicon).

قول من يدعى
الفساد فاذا اتفقا
علي الفساد بذلك
السبب يصدق قان
في حق الشفيع
و بين ذلك في
المنتقى فقال
لو قال المشتري
للبائع بعنتيرها بالف
درهم ورطل من
خمر فقال البائع
صدقت لم اصد
قهما علي الشفيع
ولو قال بعنتيرها
بكمر و صدقه
البائع فلا شفعة
للسفيع هذا هو
لقط المنتقى وجعل
القدوري في كتابة
المذكور في المنتقى
قول ابي يوسف رح
في احدى الروايتين
منه قال القدوري
كان ابا يوسف
على هذه الرواية
يعتبر هذا الاختلاف
بالاختلاف بين
المتعاقدين ولو
اختلف المتعاقدان
فيهما بينهما فقال
المشتري بعنتيرها
بالف درهم ورطل
من خمر وقال البائع
لا بل بعنتيرها بالف
درهم فالقول قول

accept the words of both of them as against the pre-emptor, but if the purchaser says, " You have sold this house to me for wine," and the seller confirms it, then the pre-emptor is not entitled to pre-emption, it is so stated in the *Muntaqā*, but Imām Quduri observes that what is mentioned in the *Muntaqī* is one of the two reports of Imām Abu Yusuf, and Imām Qudūri has further said that according to this narration Imām Abu Yusuf has resorted to *Qiās*, e.g., when both the parties differ and the purchaser says, " You have sold this house to me for 1,000 *dirhams* and a *ratt* of wine " while the seller says, " No, I have sold it for 1,000 *dirhams*," then the word of the seller will be accepted. And if the vendee says " You have sold this house to me for wine or a pig," and the vendor says, " I have sold it to you for 1,000 *dirhams*," then the word of the purchaser will be accepted because the sale of wine is not lawful in any way. And the word of the person who claims the validity of sale is accepted only in a lawful contract, contrary to the case of sale subject to option or one such as for 1,000 *dirhams* and one *ratt* of wine. As regards the view of Imām Abu Ḥanifa and Imām Muḥammad

البائع ولو قال المشتري بعنتيرها بخمر او خنزير وقال البائع بعنهما بالف درهم فالقول قول المشتري لأن البيع بخمر لا جواز له بحال و إنما يجعل القول قول من يدعى الجواز في عقد له جواز بحال بخلاف البيع باجل فاسد او بالف درطل من خمر فاما على قول أبي حنيفة و محمد اذا اتفقا على الفساد وكذا بهما الشفيع فلا شفعة للشفيع على كل حال كما لو اتفقا على البيع بشرط الخيار للمبائع وكذا بهما فيه الشفيع كذا في الذخيرة -

٩٧ - اشتري عشر
الضياعة بثمن كثير
ثم بقيت بها بثمن قليل
فله الشفعة في العشر
دونباقي فلو
اراد ان يحلفه
بالله ما ارادت

they hold that if the seller and the purchaser agree on the invalidity of sale, while the pre-emptor denies it, then the pre-emptor is not entitled to pre-emption. As for instance, if they agree as to the sale with an option for the seller and the pre-emptor denies it, then he is not entitled to pre-emption. This is according to the *Zakhira*.

97. If a person purchases one-tenth part of a farm at a high value, thereafter purchases its remaining portion at a low price, then the pre-emptor is entitled to pre-empt the tenth portion and not the rest of it. However, if the pre-emptor demands an oath from the vendee

بذلك ابطال شفعتي
 لم يكن له ذلك لانه
 لو اقر به لا يلزم
 واستخلفه بالله ما
 كان البيع الاول
 تلبيته فله ذلك
 لانه معنى لو اقر به
 يلزم وهو خصم
 وهو تاويل ما ذكر
 في الكتاب انه
 اذا اراد الاستخلاف
 انه لم يرده ابطال
 الشفعة له ذلك اي
 اذا ادعى ان
 البيع الاول كان
 تلبيته كذا في
 القنبلة - في
 الا جناس اذا قال
 المشتري اشتريت
 هذه الدار لابني
 الصغير وانكر شفعة
 الشفيع فلا يمتن
 علي المشتري ان
 كان الشفيع اقران
 له ابنا صغيراً وان
 انكر ان له ابنا
 يحلف الشفيع بالله
 ما قعلم ان له
 ابنا صغيراً وان كان
 الابن كبيراً لو

thus, "By God, I did not mean to defeat your right of pre-emption by such consecutive sales," then there is no use because if he admits, nevertheless he cannot be bound by it in any way. But if the pre-emptor demands an oath in this way, "By God, the first sale was not *talqiyah* with a view to defeat the pre-emptive claim," then he can do so, and the vendee will be bound by it. And the explanation in the *Muntaqa* about such an oath, viz., "by God, I did not mean to defeat your right of pre-emption by these sales, is that the real object was to prove that the first sale was *talqiyah* and not a *bona fide*. This is according to the *Qunya*. It is stated in the *Ajnas* that if the purchaser says, "I have purchased this house for my minor son," and denies the pre-emptor's right of pre-emption, then if the pre-emptor admits that the vendee has a minor son, the vendee will not be bound to swear; but if the pre-emptor denies the existence of the infant son, then the pre-emptor must be sworn thus, "By God, I do not know that he has any infant son." And if the son was a major, and the purchaser has handed possession of the house to him, then he (the purchaser)

قد سلم الدار
إليه دفع عن نفسه
الخصومة وقبل
تسليم الدار هو خصم
للشفيع كذا في
الذخيرة - وإذا اشتري

من امرأة فاراد ان
يشهد لها عليها فلم
يجد من يعرفها
الا من له الشفعة
فإن شهادتهم
لاتجوز عليها ان
انكرت ذلك كذا
في المحيط -

٩٨ - وإذا شهد
ابنا البائع على
الشفيع بتسليم
الشفعة والدار في
يد البائع ان
كان البائع يدعى
تسليم الشفعة لا
تقبل شهادتهما وان
كان يجحد تقبل
شهادتهما وان كانت
الدار في يد
المشتري تقبل
شهادتهما لأنهما
يهذه الشهادة لا
يحران إلى أيهما

will be relieved of all litigation,
but so long as he has not delivered the
house to his major son, he will be a party
to the suit instituted by the pre-emptor.
This is according to the *Zakhira*.
If a person purchases something from a
woman and desires to invoke witnesses
on it, but he does not find any person
who knows her except the pre-emptor,
then the evidence of the pre-emptor will
not be lawful as against her in case she
denies the sale. This is according to
the *Muhīt*.

98. If the two sons of a seller give
evidence against the pre-emptor that he
has surrendered his right of pre-emption,
while the property is still in the posses-
sion of the seller, who also claims that
the pre-emptor had relinquished his right,
then the evidence of the sons will not be
accepted ; but if the seller denies relin-
quishment of the right by the pre-emptor,
then their evidence will be admissible.
And if the property were in the posses-
sion of the purchaser, then the evidence of
the two sons will be admissible because,
in this case, the two sons by their evi-
dence, neither do any good to their father

مَغْنِمًا وَلَا يَدْ فَعَانْ
 عَنْهُ مَغْرِمًا وَإِذَا
 شَهَدَ الْبَايْعَانُ عَلَى
 الشَّفِيعِ بِتَسْلِيمِ
 الشَّفْعَةِ لَا تَقْبِلُ
 شَهَادَتَهُمَا وَإِنْ كَانَتْ
 الدَّارُ فِي يَدِ
 الْمُشْتَرِي لَا نَهَمَا كَانَا
 خَصْمِينَ فِي هَذَهِ
 الدَّارِ قَبْلَ التَّسْلِيمِ
 إِلَيْهِ الْمُشْتَرِي وَمَنْ
 كَانَ خَصْمًا فِي
 شَيْءٍ لَا تَقْبِلُ شَهَادَةُ
 فِيهِ وَإِنْ لَمْ يَبْقَ
 خَصْمًا إِمَّا ابْنَاهُ
 مَا كَانَا خَصْمِينَ
 فِي هَذَهِ الدَّارِ
 هَذَا إِذَا شَهَدَ
 ابْنَا الْبَايْعَانَ عَلَى
 الشَّفِيعِ بِتَسْلِيمِ
 الشَّفْعَةِ غَامَا إِذَا
 شَهَدَ عَلَى الْمُشْتَرِي
 بِتَسْلِيمِ الدَّارِ إِلَيْهِ
 الشَّفِيعِ فَانْهَ لَا تَقْبِلُ
 شَهَادَتَهُمَا سَوَاءً كَانَتْ
 الدَّارُ فِي يَدِ الْأَبِ
 أَوْ فِي يَدِ الْمُشْتَرِي
 وَسَوَاءً يَدْعُى الْأَبُ
 أَوْ لَمْ يَدْعُ كَذَا
 فِي الْمُحْكَيْطِ وَإِنْ كَانَتْ
 الدَّارُ لِثَلَاثَةِ نَفَرٍ
 فَشَهَدَ اثْنَانٌ مِنْهُمْ
 أَفْهُمْ جَمِيعًا بَاعُوهُ
 مِنْ فَلَانٍ وَادْعُوا
 ذَلِكَ فَلَانَ حَجْدٌ

nor protect him from any harm. And if the two sons had deposed to the effect that the pre-emptor had simply acquiesced in the sale, then their evidence cannot be accepted even if the house sold were in the possession of the purchaser, because they were interested parties though the purchaser had taken possession of the property, yet their testimony cannot be accepted. In the above case the evidence of the two sons of the seller was accepted on the ground that they were not interested parties, and this was so only when the two sons of the seller stood as witnesses to the surrender of the right of pre-emption. And if they give evidence to the effect that the purchaser has handed over the house to the pre-emptor, then their evidence will not be heard, it is immaterial whether the house is in possession of their father or the purchaser, and no matter what attitude he adopts. This is according to the *Muhūt*. If a house is owned by three persons and one or two of the co-sharers give evidence that they all have sold it, to a certain person, who also claims it, but one of the co-sharers denies it, then their evidence will not be admissible as against this co-sharer. And the

الشريك لم تجز
شهادتهم على
الشريك و للشفيع
ان يأخذ ثلثي
الدار بالشفعة وان
انكر المشتري الشراء
فاقربه الشركاء
جميعاً فشهادتهم
ايضاً باطلة وللشفع
ان يأخذ الدار
كلها بالشفعة كذا

في المبسوط -

٩٩ - و اذا وكل
الرجل رجلاً بشراء
دار و دفعها فاشترى
او باع و شهد ابنا
الموكل على الشفيع
بتسلیم الشفعة فان
كان التوكيل بالشراء
لا تقبل شهادتهما
سواء كانت الدار
في يد البائع او في
يد الوكيل او في
يد الموكل وان
كان التوكيل بالبيع
فان كانت الدار
في يد الموكل او
في يد الوكيل
لا تقبل شهادتهما
لأنهما يشهدان ان

pre-emptor will be entitled to pre-empt the two-thirds of the property. And if the purchaser does not admit the sale, but the three co-sharers depose that they have sold it to him, then even in this case, their evidence is not admissible, nevertheless the pre-emptor is entitled to take the whole house in pre-emption. This is according to the *Mabsūt*.

99. If a person appoints an agent to buy or sell a house and the agent purchases or sells it, and the two sons of the principal depose as to the surrender of the right of pre-emption by the pre-emptor, now in this case if the principal appointed the agent to buy the house, then the evidence of the two sons will not be admissible, no matter whether the house is in the possession of the seller, or the agent, or his principal ; but if the principal appointed the agent to sell the house, then also their evidence will not be admissible, should the house sold be in the possession of the principal or the agent, because by their evidence their father's ownership in the house is with advantage established, however if the

علي ايديهما بتقرير الملك لا يبيهـا وان كانت الدار في يـد المشتري تقبل شهادـةـما كـذا في المحيـط - وـاـذـاشـهـدـ البـائـعـانـ على المشـتـريـ انـ الشـفـيـعـ قدـ طـلـبـ الشـفـعـةـ حـيـنـ عـلـمـ بـالـشـرـاءـ وـالـشـفـيـعـ مـقـرـأـهـ مـنـدـ اـيـامـ وـقـالـ المشـتـريـ وـمـاـ طـلـبـ الشـفـعـةـ فـشـهـادـةـ البـائـعـينـ باـطـلـةـ وـكـذـلـكـ شـهـادـةـ اوـلـادـ هـمـاـ كـمـاـ لـوـ شـهـادـاـ عـلـيـ المشـتـريـ بـتـسـلـيمـ الدـارـ إـلـيـ الشـفـيـعـ وـاـنـ قـالـ الشـفـيـعـ لـمـ اـعـلـمـ بـالـشـرـاءـ إـلـاـ السـاعـةـ فـالـقـولـ قـولـهـ مـعـ يـمـيـنـهـ فـانـ شـهـدـ البـائـعـانـ اـنـ اـيـامـ عـلـمـ مـنـدـ اـيـامـ فـشـهـادـةـماـ باـطـلـةـ انـ كـانـتـ الدـارـ فيـ ايـديـهـماـ اوـ فيـ يـدـ المشـتـريـ كـذاـ فيـ المـبـسوـطـ قـامـتـ بـيـنةـ انـ الشـفـيـعـ سـلـمـ الشـفـعـةـ وـقـامـتـ بـيـنةـ انـ البـائـعـ وـالمـشـتـريـ سـلـمـ الدـارـ قـضـيـ

house sold were in the possession of the purchaser, then their evidence will be admissible. This is according to the *Muhit*. If the two vendors give evidence against the purchaser that the pre-emptor claimed pre-emption when he heard of the sale, and the pre-emptor admits that he came to know about the sale recently, while the purchaser says that he did not claim pre-emption, then the evidence of both the vendors is useless and likewise the evidence of their sons would be useless as was the case when they gave evidence that the purchaser had delivered the house to the pre-emptor. And if the pre-emptor says, "I heard of the sale just now," then his word on oath will be accepted. And if both the sellers were to depose that some time ago the pre-emptor had heard about the sale, then their evidence will not be admissible provided the house is either in the possession of the two sellers or the purchaser. This is according to the *Mabsut*. If evidence is produced to the effect that the pre-emptor has surrendered his right of pre-emption, and evidence is also produced to the effect that the seller and the purchaser have handed

بها للذى في يده
كذا في محيط
السرخسي - وإذا
كفل رجلان بالدرك
المشتري ثم شهدا
عليه بتسليم الدار
إلى الشفيع بالشفعه
فشهادتهما باطلة
وكذلك ان شهادا
ان الشفيع سلم
الشفعه فهما بمنزلة
البائعين في ذلك
لا تقبل شهادتهما
كذا في المبسوط -

over the house subject of pre-emption, to the pre-emptor, then the decree will be passed in favour of the person who has the possession of the house. This is according to the *Muhit* of *Sarakhsî*. If two persons guarantee the purchaser for any defect that may be found in the property, and thereafter they depose that he has surrendered the house to the pre-emptor, then their evidence will not be accepted, and similarly if they both depose that the pre-emptor has surrendered his right of pre-emption, then their evidence will not be accepted because they stand as if in the place of the seller. This is according to the *Mabsūt*.

١٠٠ - اقر
المشتري انه اشتري
هذه الدار بالف
درهم واحدا
الشفيع بذلك ثم
ادعى البائع ان
الاثنین الفان واقام
على ذلك قبليت
بينة وكان للمشتري
ان يرجع على
الشفيع بالف آخر
وان اقران الاثنین

100. If the purchaser says, "I have purchased this house for 1,000 *dirhams*," and the pre-emptor pre-empts the house for the same price, while the seller claims that the price was 2,000 *dirhams*, and invoked witnesses on it, then his witnesses will be heard, and the purchaser will have the option to recover the balance of 1,000 *dirhams* from the pre-emptor, even though the latter had paid the price of 1,000 *dirhams*. Similarly if the seller claims thus

الف وكذلك اذا ادعى البائع انه باعها من هذا المشتري بعرض بعينه و اقام على ذلك بيضة فالقاضي يسمع بيضة وبقضى له بذلك علي المشتري وسلم الدار للشفيع بقيمة ذلك العرض قان كان ما اخذ المشتري وذلك الف اقل من قيمة العرض رجع علي الشفيع بما زاد علي الالف الى تمام قيمة العرض وان كان اكثر من قيمة الارض رجع الشفيع عليه بما زاد علي قيمة العرض الى اتمام الالف وادا تزوج امراة على ان ترث علي الزوج القاضي وجبت الشفعة في حصتها الا عند ابى يوسف و محمد فاختلغا في مهر مثلها وقت العقد فقال الزوج كان مهر مثلها الفا و للشفيع نصف الدار وقال الشفيع كان

"I have sold this house to the purchaser for some specified goods," thereafter invoked witnesses on it, then the Kazi after hearing the witnesses will pass a decree in lieu of the same specified goods against the purchaser, and the pre-emptor will pre-empt the house in lieu of the value of the specified goods. Consequently if the amount which the pre-emptor paid to the purchaser, namely, 1,000 *dirhams*, is less than the full value of the goods, then he will pay the additional amount to the purchaser, but if the amount is more than the full value of the goods, then the pre-emptor is entitled to demand back the excess. If a person marries a woman in lieu of a house on condition that she should give him 1,000 *dirhams*, then according to Imām Abu Ḥanifa the right of pre-emption arises against a portion of the house of the value of 1,000 *dirhams*, but Imām Muḥammad and Abu Yusuf hold the contrary view. And if they differ on the question of dower, and the husband says that her *mahr-i-misl* is 1,000 *dirhams*, then the pre-emptor may pre-empt half of the house; but if the pre-emptor

احدثت فيها هذا
البناء و كذبة الشفيع
مهر مثلها خمسة
ولي ثلثا الدار
فالقول قول الزوج
مع يمينه وان
اقاما البنية فالبنية
للمشتري عند هما
كما لو اختلفا في
مقدار قيمة البناء
الهالك فإذا ادعى
على رجل حقا في
ارض او دار فصالحة
على دار فللشفيع
فيها الشفة بقيمة
ذلك الحق الذي
ادعى فان اختلفا
في قيمة ذلك الحق
فالقول قول المدعي
وهو الما خود منه
وان اقاما البنية
على قيمة ذكر
هنا ان البنية بنية
الشفيع عند ابي
حنيفة² هكذا في
المحيط - و اذا اشتري
الرجل دار بالف
درهم ثم اختلف
الشفيع والمشتري
المشتري فقال

says that her *mahr-i-misl* is 500 *dirhams* and he should get two-thirds of the house in pre-emption, then the word of the husband on oath will be accepted. And if both the parties produce witnesses, then, according to the two disciples, the witnesses of the purchaser will be accepted, similar to the case as regards the value of a ruined building. If a certain person files a suit against another person in respect of some property, thereafter he compounds the claim in lieu of a house, then the pre-emptor is entitled to pre-empt the house obtained in compromise. And if they differed as to the value of the claim, then the word of the pre-emptor will be preferred, and if they both adduce proof as to its value, then in this case, according to Imām Abu Hanifa the evidence of the pre-emptor will be accepted. This is according to the *Muhīt*. If a person purchases a house for 1000 *dirhams*, thereafter the pre-emptor and the purchaser differ, the purchaser says, "I have constructed this building in this house, and the pre-emptor denies it, then the word of the purchaser will be accepted. And if both adduce proof, then the proof of the

فالقول قول المشتري
وان اقاما البيينة
فالبينية بينة الشفيع
وعلى هذا اختلافهما
في شجر الأرض
ولكن انما يقبل
قول المشتري اذا
كان مكتنلا حتى
اذا قال احد ثث فيها
هذه الاشجار من
لم يصدق على ذلك وكذلك فيما
اشهده من البناء
وغيره وان قال
اشترىتها من د عشر
سنين واحد ثث
فيها هذا فالقول قوله
كذا في المبسوط -

١٠١ - ولو قال
المشتري باعني
الارض ثم وهب لى
البناء او قال وهب
لى البناء ثم باعني
الارض وقال الشفيع
بل اشتريتهما معا
فالقول للمشتري
ويأخذ المبيع بلا
بناء ان شاء كذا
في محيط السرخسي -

pre-emptor will be preferred. Similarly if they differ as to the trees standing on a certain plot, then the same law is applied but it should be noted that the word of the purchaser will be accepted only when it savours with truth; e.g., if the purchaser had said that he planted trees only yesterday then his word will not be accepted.¹ And the same principle will apply in similar cases to buildings, etc., whereas if he said that he purchased the land ten years ago, and had then planted trees in it, then his word would be accepted. This is according to the *Mabsūt*.

101. If the purchaser says that the owner of the house sold him first the land, he then made a gift of the building to him, or he says that he made a gift of the building, thereafter sold the land, but the pre-emptor says "No, you have purchased both at the same time," then the word of the purchaser will be accepted. And the pre-emptor, if he so desires may pre-empt the land without pre-empting the building. This is according to the *Muhibb* of *Sarakhsī*. But

¹ Because it is impossible to have full grown up trees in course of a single day.

قال ان البائع لم اهبه لك البناء فالقول قوله مع بيمينه ويأخذ بناءه وان قال قد وهبته لك كانت الهمة جائزة كذا في المبسوط ولو قال المشتري وهب لي هذا البيت مع طريقه من هذا الدار ثم اشتريت بقيتها وقال الشفيع نابل اشتريت الكل فللشفيع الشفعة فيما اقر انه اشتري ولا شفعة فيما ادعى من الهمة وابهما اقام البينة قبلت بيته وان اقاما جميعا البينة فالبينة بينة المشتري عند ابي يوسف² لأنها تثبت زياده الهمة دينبغي ان تكون البينة الشفيع عند محمد² لا فيها تثبت زياده³ كذا الاستحقاق

if the seller says, "I have not made a gift of the building to you," then his word on oath will be accepted, and the pre-emptor is entitled to pre-empt the building; but if the seller says "I have made a gift of the building to you," this will be lawful (and in this case no pre-emption arises"). This is according to the *Mabsūt*. If the purchaser says, "The owner of the house made a gift of this house along with its way to me, and then I purchased its remaining portion," while the pre-emptor says, "No, you have purchased the whole house," then the pre-emptor is entitled only to pre-empt that portion of the house which the purchaser admits to have purchased, and he cannot pre-empt that portion which is subject of the gift and if either of them tender evidence then his proof will be accepted; but if both tender evidence, then according to Imam Abu Yusuf the evidence of the purchaser will be accepted, because the witnesses establish the gift, but according to Imām Muhammad the proof of the pre-emptor should be preferred, for it establishes the right of pre-emption. This is according to the

فِي الْبَدَائِعِ - وَانْ اقْرَبْ
بِهِمَا الْبَيْتُ لِلْمُشْتَرِي
وَادْعِيَ الْمُشْتَرِيَ أَنَّ
الْهَبَةَ كَانَتْ قَبْلَ
الشَّرَاعِ غَلَاشَفَعَةً لِلْجَارِ
لَذِكْ شَرِيكٍ فِي
الْحَقُوقِ وَقَتْ شَرَاءِ
الْبَاقِيِّ وَالْجَارِ
يَقُولُ لَابْلَ كَانَ
الشَّرَاءُ قَبْلَ الْهَبَةِ
وَلِيَ الشَّفَعَةَ فِيمَا
اَشْتَرَبْتُ فَالْقَوْلُ قَوْلُ
الشَّفِيعِ وَإِذَا قَامَتْ
الْبَيْنَةُ عَلَى الْهَبَةِ
قَبْلَ الشَّرَاءِ فَانَّ
صَاحِبَهَا أَوْ لِي بِالشَّفَعَةِ
مِنَ الْجَارِ كَذَّا فِي
الْمُحِيطِ - فَانْ جَحَدَ
الْبَائِعُ هَبَةَ الْبَيْتِ
كَانَ الْقَوْلُ قَوْلُهُ مَعَ
يَمِينِهِ أَنَّ صَدِيقِي
الْبَائِعُ الْمُشْتَرِي فِيمَا
قَالَ كَانَ الْبَيْتُ لِلْمُوْ
هُوبُ لَهُ وَلَا يَصْدِّ
قَانُ عَلَى الْبَطَالِ
الشَّفَعَةُ فِي الدَّارِ إِلَّا
أَنْ تَقْوِمَ الْبَيْنَةُ عَلَى
الْهَبَةِ قَبْلَ شَرَاءِ
الْدَّارِ فَيُصِيرُ

Badāyī‘. If the *Shafī‘-i-jār* admits that a certain house of the enclosure was first made a gift to the purchaser and the purchaser affirms that he took the gift before he purchased the rest of the property, then there exists no right of pre-emption for the *Shafī‘-i-jār*, because the purchaser had become a sharer in the property at the time of the purchase of the remaining portion; but if the *jār* says, “No, the purchase took place before the gift and hence, I have the right to pre-empt the sale,” then the statement of the pre-emptor will be accepted, but if evidence is produced to the effect that the gift was made before the sale, then the claim of the donee will be preferred to that of the *Shafī‘-i-jār* as regards the rest of the property. This is according to the *Muhīt*. And if the donor denies the gift of the house, then his word on oath will be accepted, and if he confirms the word of the purchaser,¹ then the house will belong to the donee, but as regards the rest of the property his statement will be of no use in invalidating the right of pre-emption; however if witnesses were produced to the effect that the gift had preceded the sale, then the donee will

¹ i.e., the donee.

المشتري شريكًا في
الدار فيتقدم على
الجبار كذا في
فتاوی قاضي خان۔
١٠٢ - ولو اشتري
دارين و لم ما شفيع
ملاصق فقال
المشتري اشتريت
واحدة بعد واحدة
فانا شريكك في
الثانية وقال الشفيع
لابل اشتريتهما
صفقة واحدة فلي
الشفعه فيهما جمبعا
فالقول قول الشفيع
لان المشتري اقر
بشرطهما و ذلك
سبب لثبتوت الحق
ثم يدعى حقا لنفسه
بدعوى تفريق
الصفقة فالقول
للشفيع ولو قل
المشتري اشتريت
ربعا ثم ثلاثة اربع
ذلك اربع وقال
الشفيع بل اشتريت
ثلاثة اربع ثم
نم ربها فالقول
للشفيع لأن المشتري
اقر بشروط ثلاثة
اربع وهو سبب

become a *sharīk*, co-sharer, and hence he will have a preferential right to the rest of the property as against the *Shāfi'i-i-jār*. This is according to the *Fatāwā-i-Kāzī-Khān*.

102. If a person purchases two such houses that have a *Shāfi'i-Mulāsik*, and the purchaser says, "I have purchased them one after another, and hence, I am along with you entitled to pre-empt the second house" while the pre-emptor says, "No, you have purchased both the houses by one transaction of sale, and hence, I have a right of pre-emption in both of them," then the word of the pre-emptor will be accepted, because the purchaser has at least admitted to have purchased both the houses, though he asserts separate transactions, and it is a sufficient cause to give rise to the right of pre-emption. If the purchaser says, "I have purchased one-fourth of the house, and thereafter its three-fourths, therefore your right of pre-emption appertains to one-fourth of the house," and the pre-emptor says "No, you have rather first purchased three-fourths, and then the one-fourth," then the word of the pre-emptor will be accepted, because the purchaser has admitted to have purchased the three-fourths, and this is a sufficient

لثبت حق الشفعة
ثم ادعى اما يسقطه
وهو تقدم الرابع في
البيع فلا يصدق
ولو قال المشتري
اشترت صفقة واحدة
وقال الشفيع اشتريت
نصفا فان أخذ
النصف فالقول
للمشتري ويأخذ
الشفيع الكل او
يدع كذا ثي
محيط السرخسي -
رجل اقام البيينة
انه اشتري هذه
الدار من فلان
بالف درهم واقام
آخر البيينة انه
اشترى منه هذا
البيت بطريقه
بمائة درهم منذ
شهر قضيت بالبيت
بينهما لصاحب
الشهر ثم له الشفعة
فيما بقى من الدار
ولو لم بوقت شهوده
صاحب البيت قضيت
بالبيت بينهما
نصفين وقضيت
ببقية الدار للذي

cause to establish the right of pre-emption, though now he refers to it in such a manner that it will invalidate the cause that is, he says that he had purchased one-fourth first, and if the purchaser says, "I have purchased the whole house by one transaction," but the pre-emptor says, "No you have first purchased the half, and hence, I desire to pre-empt the half," then the word of the purchaser will be accepted, and the pre-emptor will have the option either to take whole house or surrender his right. This is according to *Muhīt-of-Sarakhsī*. A person adduces proof that he purchased an enclosure from a certain person for 1000 *dirhams*, and another person adduces proof that he purchased a certain house in the enclosure with the right of way from another person for 100 *dirhams* about a month ago, then the Court shall pass a decree in favour of that person who will tender proof as to the time of sale, and he will be entitled to pre-empt the rest of the enclosure. And if there was no evidence as to the time of purchase, then the Court shall pass a decree in the favour of both the persons, half of the property for

اقام البيينة على انه اشتري كلها ولا شفعة لواحد منهما على صاحبة لانه يثبت سبق شراء احدهما ولو كانت الدار ان متلازتين فاقام رجل بنية انه اشتري احدهما منذ شهر بالف درهم وأقام آخر بنية انه اشتري الاخرى منذ شهرين قضيت له بشراء هذه الدار منذ شهرين كلها وقد شهدوا جعلت له الشفعة في الدار الاخرى ولو لم يوقتا قضيت لكل واحد منها بداره ولم اقض بالشفعة له وكذلك لو كان احد عما يقبض الدار ولم يقبض الاخر ولو وقت احدهما ولم يوقت الاخرى قضيت لصاحب الوقت بالشفعة كذا في المبسوط -

each, and none of the two are entitled to exercise his right of pre-emption over the other, as none has established that he had purchased first. And if two houses were adjacent to each other, and a person tenders evidence, saying "I purchased one of these two houses a month ago for 1000 dirhams" and some other person adduces proof, saying "I purchased the other house two months ago," then the Court shall pass a decree in favour of the latter who adduced proof that he had purchased the house two months ago, and thereby has established his right of pre-emption in the other house. And if both the parties fail to prove the time of sale, then no decree shall be made for neither is entitled to the right of pre-emption as against the other, and the same will be the case where one of the two purchasers has already taken possession of the house purchased by him, while the other has no such possession. And if one of the two persons tenders evidence as to the point of time, while the other fails to do so, then a decree of pre-emption shall be given in favour of that person who has tendered evidence. This is according to the *Mabsūt*. A person purchased a house,

رجل اشتري دارا
فادعى الشفيع ان
المشتري هدم طائفة
من الدار كذبه
المشتري كان القول
قول المشتري والبينة
بينة الشفيع كذا
في فتاوى قاضي

- خان

and the pre-emptor claims that the purchaser has demolished a part of the house, while the purchaser denies it, then the word of the purchaser will be preferred, but if the pre-emptor tendered evidence, then it will be preferred. This is according to the *Fatāwā-i-Kāzī Khān*.

الباب

الحادي عشر

في الوكيل بالشفعة وتسليم الوكيل بالشفعة وما يتصل به ١٤٣ - فإذا أقر المشتري بشراء الدار وهي في يده وجبت فيها الشفعة وخصمه الوكيل ولا تقبل من المشتري بيته أنة اشتراها من صاحبها إذا كان صاحبها غائبا حتى لو حضر صاحبها بعد إقامة المشتري البيبة على الشراء منه وصدقه فيما أقر له من الملك وكذبه فيما ادعى من الشراء يسترد الدار من يد الشفيع ويسلم الي البائع لأنهم اتفقا على ان اصل الملك كان له ولم يثبت النقل من المشتري ولكن

CHAPTER XI

AS REGARDS APPOINTMENT OF AN AGENT FOR PRE-EMPTION, AND THE SURRENDER OF THE RIGHT OF PRE-EMPTION BY HIM, AND THAT WHICH APPERTAINS TO IT.

103. If an agent admits the purchase of a house which is in his possession, then the right of pre-emption arises, and the agent will be made a party to the suit, but his statement to the effect that he purchased the house from its owner when the latter is absent, will not be accepted. Consequently if the owner turns up after the agent had adduced proof of the purchase from him, and he accepts the allegation about his ownership but denies the fact of sale, then in this case the house cannot be pre-empted by the pre-emptor, and it will be restored to the owner, because they all agree that the ownership of the house is vested in him, and the agent has not established the sale. The owner will be sworn thus: "By God I have not sold this house," and if he swears accordingly then the house must be restored to him. However if proof is adduced in presence of the owner to the

يحلف صاحبها
بالله ما بعثها من
هذا المشتري فإذا
حلف حنيئد تره
الدار عليه فان قاموا
ببينة بمحضر صاحبها
انه باعها من
المشتري يثبت
الشراء و تسلم
الدار للشيفع و
تقيل هذه البيينة
من المشتري و من
الشيفع و ان اقر
البائع بالبيع و
اذكر المشتري
والدار في يد البائع
قضى بالشفعة كذا
في المحيط - و اذا
اقر المشتري
بالشراء وقال ليس
لغلان فيها شفعة
سالت الوكيل
البيينة على الحق
الذى وجبت
له بالشفعة من
شركة او جوار
فإذا اقامها قضيت
له بالشفعة و ذلك
بان يقيم البيينة على
ان الدار التي
الي جنب المبيعة
ملك لموكله فلان
فإذا اقام البيينة
ان الدار التي
الي جنب الدار

effect that he had sold the house to the purchaser, then the sale will be established, and the house will be pre-empted by the pre-emptor, the purchaser and the pre-emptor are both entitled to tender such evidence. And if the seller admits the sale, and the purchaser denies it, and the house is in the possession of the seller then also a decree for pre-emption could be passed. This is according to the *Muhīt*. If the purchaser admits his purchase, but asserts that such and such a person is not entitled to pre-emption, then the Court shall demand evidence from the agent (of the pre-emptor) as to the cause of the pre-emption, whether it is by reason of partnership or neighbourhood that the right of pre-emption accrues, and if he tenders proof then the Court shall pass a decree of pre-emption in his favour, e.g., he should prove that the house which is situated next to the house sold belongs to his principal. If he adduces proof that the house which is next to the house sold is merely in the possession of his principal, then the Court shall not accept such proof, and the Court shall not also accept the evidence of the two sons of the principal or his parents or his

المبيعة في ديد موكلة لم
أقبل ذلك منه قال ولا
أقبل من ذلك شهادة
أيني الموكل و أبوية
و زوجته ولا شهادة
المولى اذا كان
الوكيل او الموكل
عبد له او مكتبا
كذا في المبسوط -
اذا اراد
اثبات الشفعة
بالشركة فاقام بيضة
ان لموكلة فلان
نصيبها من هذه
الدار المبيعة ولم
يبيسوا مقداره
لا يقبل ذلك منه
ولا يقتضى له بالشفعة
كذا في الذخيرة -
اذا وكل
رجل رجلا باخذ
دار له بالشفعة ولم
يعلم التمن صحي
التوكييل و اذا
أخذها الوكيل
بما اشتراها المشتري
لهم الموكل و ان كان
ذلك ثمنا كثير ابحث
لا يتغابن الناس
فيها سواء اخذها
بقضاء او بغير قضاء
كذا في المحيط -
١٠٣ - واذا وكل
رجل الشفيع ان
ياخذ الدار له

wife, and the Court shall not accept the evidence if the agent or the principal were an absolute slave or slave *mukātib*. This is according to the *Mabsūt*. If he (the agent of the pre-emptor) intends to establish pre-emption by reason of partnership and adduces proof that his principal has a share in the house sold, but the witnesses do not depose as to the extent of his share, then such proof cannot be accepted, and a decree for pre-emption cannot be passed in his favour. This is according to the *Zakhira*. If a person appoints another person as his agent to pre-empt a certain house on his behalf, but did not inform him of the sale price nevertheless such an appointment is lawful; consequently if the agent pre-empts it for the price for which the purchaser had purchased, then the principal will be bound by it, no matter whether this price is so much that people in general will not be willing to purchase it at such a price, and whether he pre-empted it under the decree of the *Kāzī* or by mutual agreement. This is according to the *Muhit*.

104. A person appoints the pre-emptor as his agent to pre-empt the house on his behalf, and if the pre-emptor

فاظهر بالشفعه الشفيع ذلك فليس له ان يأخذها لان طلبه لغيره تسليم منه للشفعه فانما يطلب البيع من الموكيل ولو طلب البيع لنفسه كان به مسلما لشفعه فاذا طلبه لغيره او لكي ولما كان اظهراه ذلك بمنزلة التسليم للشفعه استوى فيه ان يكون المشتري حاضرا او غير حاضر فان اسر ذلك حتى اخذها ثم علم بذلك فان كان المشتري سلمها اليه بغير حكم فهو جائز وهي للامر لانه ظهر انه كان مسلما شفعه ولكن تسليم المشتري اليه سمحا بغير قضاء بمنزلة البيع المبتدء فكان اشتراها للامر بعد ماسلم الشفعه و ان كان القاضي

acts accordingly then he himself will not be entitled to pre-empt the house in question, because the demand of pre-emption by the pre-emptor on behalf of another person amounts to the surrender of his own right of pre-emption, for what he demands is in effect a purchase on behalf of his principal, while if he demanded the purchase for himself it would not be considered a surrender of his right of pre-emption, and since he demands on behalf of another person, his act will obviously be regarded as a surrender of his own right of pre-emption; and since his conduct as an agent, amounts to a surrender of his right of pre-emption it will make no difference whether the purchaser is present or not. And if the pre-emptor does not disclose the fact of his being an agent till he takes the house, and he thereafter discloses it, then if the purchaser has handed over the house in question to him it will be considered valid, and the house in question will become the property of the principal, because it is evident that the pre-emptor had relinquished his right of pre-emption, and the act of the original purchaser in delivering the property in good faith without the decree of the

بها فانها قرء
علي المشتري الاول
لابه لما ظهر انه
كان مسلما شفعة
تبين ان القاضي
قى على المشتري
الاول بغير سبب
فيكون قضاء باطلأ
فتره الدار عليه
كذا في المسوط -

Kāzī will be considered as if a fresh sale, that is the pre-emptor after having relinquished his right of pre-emption has purchased the house on behalf of the principal, but if the Kāzī has passed a decree of pre-emption, then the house will be restored to the real purchaser, because when it is proved that the pre-emptor had surrendered his right, then it is obvious that the decree of the Kāzī is of no consequence and the house should be restored to the purchaser. This is according to the *Mabsūt*.

١٥٠ - ولا يصح
نوكيل الشفيع
المشتري باخذ
الشفعة سواء كانت
الدار في يده او في
يد البائع كذا في
المحيط - ولو وكل
البائع بالأخذ
بالشفعة جاز ذلك
في القیاس و في
الاستحسان لايجوز
ذلك و اذا قال قد
وكلتك بطلب
الشفعة بكذا درهما
، اخذه فان كان
 الشراء وقع بذلك
او باقل فهو وكيل
و ان كان باكثر

105. And if the pre-emptor appoints the purchaser as an agent to pre-empt the house on his behalf, such appointment will be considered invalid, whether the house were in the possession of the purchaser or in that of the seller. This is according to the *Muhūt*. And if he (pre-emptor) appoints the seller as an agent to pre-empt the house on his behalf, then according to the doctrine of *qiās*, such an act is considered valid ; but according to *Istehsān* it is invalid. And if the pre-emptor says to the seller, "I appoint you an agent to pre-empt the house for so many *dirhams*," now if the purchase has

فلييس بو كيل و كذلك لو قال وكل ذلك بطلها ان كان فلان اشتراها فاذا قد اشتراها غيره لا يكون وكيلا و اذا وكل ، جلين بالشقة فلاحدهما ان يخاصم الآخر ولا يأخذ احدهما بدون الآخر و اذا سلم احدهما الشقة عند القاضي جاز على الموكيل كذا في المبسوط - و اذا وكل وكيلا يأخذ وكل وكيل وكيل و يكن لهذ الوكيل الثاني ان يوكل غيره الوكيل وكل ما صنع لم يكن لهذ الوكيل الثاني ان يوكل بالشقة اذا سلم الشقة ذكر في شقة الاصل اده ان

really taken place for that amount or less, then his appointment as an agent is valid; but if the price is a greater amount, then it is invalid. Similarly if the pre-emptor says, 'I appoint you as an agent to pre-empt that house provided that the house has been purchased by that particular person,' now if it happens that the purchaser was some other person, then this agent's appointment is of no use. If the pre-emptor appoints two persons as agents to pre-empt the house on his behalf, then one of them may file the suit, but he alone cannot get possession of the house without the presence of the other. And if one of them surrenders the right of pre-emption in presence of the Kāzī, then such surrender will be binding upon the principal. This is according to the *Mabsūt*. If the pre-emptor appoints an agent to pre-empt the house on his behalf, then the agent is not entitled to appoint another person as an agent, but if the principal has conferred a general power of attorney on the agent to do whatever he likes, then he may lawfully appoint another person as sub-agent. However if the principal had delegated all his powers, and the agent appoints another sub-agent, and also autho-

سلم في مجلس القاضي صح وان سلم في غير مجلس القاضي لا يصح عند ابي حنيفة² و محدث² وهو قول ابي يوسف² الاول ثم رجع ابو يوسف² عن ذا وقال يصح تسليمه في مجلس القاضي وفي غير مجلس القاضي فعلى كتاب رواية الشفعة جوز تسليمه في مجلس القاضي ولم يحك فيه خلافاً وذكر في كتاب الوكالة والمأدون الكبيران تسليمه في مجلس القاضي صحيح عند ابي حنيفة و ابي يوسف² خلافاً لمحدث² و تبين بما ذكر في كتاب الوكالة والمأدون ان ما ذكر في الشفعة قول ابي حنيفة و ابي يوسف² كذلك في المحيط-

rises him to do as he pleases then this sub-agent has no authority to appoint a third person as an agent. And if the agent surrenders the right of pre-emption, then it is stated in the *Asl* that if he surrendered it in the Court of the *Kāzī*, it will be valid, but if otherwise, then according to Imām Abu Ḥanifa and Imām Muḥammad, and according to the former view of Imām Abu Yusuf it is not valid ; but subsequently Imām Abu Yusuf changed his view and said that the surrender is valid in both the cases. Hence, according to the reports of *Kitābus Shufa'*, the surrender in the Court of the *Kāzī* is lawful ; and there is no difference of opinion on this point. And it is stated in the *Kitābul Vikālat* and *Mazoon Kabir* that according to Imām Abu Ḥanifa and Imām Abu Yusuf, the surrender of the right of pre-emption by the agent in the Court of the *Kāzī* is valid, while Imām Muḥammad holds the contrary view : hence, from the passages of *Kitābul Vikālat* and *Mazoon Kabir* it appears that what is mentioned in *Kitābus Shufa'* is the view of Imām Abu Ḥanifa and Imām Abu Yusuf only. This is according to the *Muḥīṭ*. If there are two persons who are pre-emptors of a house, and they appoint a

و اذا كان للدار
شفيغان فوكيل
رجلا و احدا
يأخذهما فسلم
الشفعة لاحدهما عند
القاضي و اخذ
كلها للآخر فهو
جائز و ان قال
عند القاضي قد
سلمت شفعة احد
هما ولم يبيئ ايهما
هو وقال انما طلبت
شفعة الآخر لم يكن
له ذلك حتى يبيئ
لايهما سلم نصيبيه
ولايهما يأخذ كذا
في الموسط - الوكيل
بالشفعة اذا طلب
الشفعة و ادعى
المشتري التسليم
ان ادعى التسليم
علي الموكلا و يطلب
يبيئ الوكيل بالله
ما تعلم ان الموكلا
قد سلم الشفعة
او يطلب يبيئ
الموكلا بالله ما
سلمني الشفعة فان
طلب يبيئ الوكيل
فالقاضي لا يحلفه
وان طلب يبيئ
الموكلا فالقاضي
يقول له سلم الدار
الي الوكيل ليأخذها
لموكلاه بالشفعة وان

person as an agent to pre-empt the house on their behalf, and in the Court of the Kāzī he surrenders the rights of pre-emption on behalf of one of his principals only, and pre-empts whole house for the other, then he can do so. And if he states before the Kāzī, "I surrender the right of pre-emption of one of the two principals," without specifying which of the two pre-emptors, and demands pre-emption for the other only, then he cannot do so unless he states which pre-emptor's right he has surrendered, and whose right he demands. This is according to the *Mabsūt*. If the agent demands pre-emption, and the purchaser claims the surrender of the right of pre-emption by the principal, and demands an oath from the agent thus, "By God I do not know that the principal has surrendered his right of pre-emption," or if he demands an oath from the principal, *viz.*, "By God I have not relinquished my right of pre-emption," now if the purchaser demands such an oath from the agent, the Kāzī cannot put the agent on oath, and if he demands it from the principal, then the Kāzī will say to him, "Deliver this house to the agent and let him pre-empt it on behalf of his

طلب يمين الموكل
وان ادعى التسليم
علي الوكيل ويطلب
يمينه فالقاضي
لا يكلّفه عند ابي
حنيفة و محمد
خلافاً لابي يوسف
وكذلك اذا شهد
شاهدان على
الرکيل اذ سلم
الشفعه عند غير
القاضي فشهادتهما
باطلة عند ابي
حنيفة و محمد
خلافاً لابي يوسف
وكذلك اذا شهد
شاهدان عليه انه
قد سلم عند القاضي
ثم عزل قبل ان
يقضى عليه لم
يجزعنه ابي حنيفة
ومحمد ولو اقر
الوکيل عند القاضي
انه قد سلم الشفعه
عند غير قاض او
عند قاض آخر
فاقراره صحيح
وبكون بمنزلة انشاء
التسليم عند هذا
القاضي كذلك في
محبطة السرخي -
واذا شهد ابنا الوکيل
او ابنا الموكل ان
الوکيل قد سلم
الشفعه عند غير

principal," and if the purchaser claims the surrender by the agent and demands this oath, then according to Imām Abu Ḥanifa and Imām Muḥammad, the Kāzī shall not put the agent on oath, but Imām Abu Yusuf holds the contrary view. If two witnesses depose that the agent surrendered the right of pre-emption outside the Court of the Kāzī then also according to Imām Abu Ḥanifa and Imām Muḥammad, their deposition is useless, but Imām Abu Yusuf holds the contrary view. Similarly if two witnesses depose that the agent had surrendered his right in the Court of the Kāzī, but before the decree was passed, the agency was revoked, then according to Imām Abu Ḥanifa and Imām Muḥammad the surrender is illegal. And if the agent admits before the Kāzī that he has surrendered the right of pre-emption outside Court or before any other Kazi," then such admission is valid, and it will be considered as if he now surrenders his right *ab initio*. This is according to the *Muḥīṭ of Sarakhsī*. And if two sons of the agent or of the principal depose that he surrendered his right outside the Court of the Kāzī, then such evidence is admissible, but if the two sons of the principal depose to

قاضٍ اجرت شهادتهم
ولَا تجوز شهادة
ابني الموكِل على
الوَكالة ولا شهادة
ابني الوكيل كذا
في المبسوط -

١٠٤ - ولو وكل
رجل ببيع داره
فباعها بالف ثم
حط عن المشتري
مائة درهم وضمن
ذلك للامر ليس
للشفعي ان يأخذها
بالشفعة الا بالف
كذا في محبيط
السرخسي - الوكيل
بشراء الدار اذا
اشترى وقبض فبحام
الشفعي وطلب
الشفعة من الوكيل
قبل ان يسلم
الوکيل الدار الي
الموکل صلح وان
كان بعد تسليم
الموکل لا يصح
وتبطل شفعة وهو
المختار كذا في
خرانة المفتين
والفتاوي الكبرى -
وهكذا في المتون -

establish the appointment of an agent, or if the two sons of the agent depose on the same point, then it is not admissible. This is according to the *Mabsūt*.

106. And if a person appoints an agent for the sale of his house, and he sells it for 1000 *dirhams*, and thereafter reduces 100 *dirhams* from the price in favour of the purchaser, but he himself makes up the reduction to the principal, then the pre-emptor must pre-empt the house for 1000 *dirhams*. This is according to the *Muhiṭ* of *Sarakhsī*. If the agent purchases the house and takes its possession, thereafter the pre-emptor demands pre-emption from him before he had actually handed over the house to the principal, then such demand of the pre-emptor is valid, but if he demands pre-emption after the agent had delivered possession of the house to the principal, then the demand will be invalid, and the right of pre-emption will be invalidated. And this is the accepted view. This is according to the *Khizānatul Muftīn* and *Fatāwā-i-Kubrā*, and a similar view is held in the *Mutūn*.

اذا كان البائع وكيل الغائب فللشفيع ان يأخذها منه اذا كانت في يده لانه عاقداً وكذا اذا كان البائع وصيانته ليبيت فيما يجوز بيعه كذا في السراج الوهاج ولو قال المشتري قبل ان يخاصمه الشفيع اشتريت لفلان وسلم اليه ثم حضر الشفيع فلا خصومة بينه وبين المشتري ولو اقر بذلك بعد ما خاصمه الشفيع لم تسقط الخصومة عنه ولو اقام بينة انه قال قبل شرائه انه وكيل فلان لم تقبل بينته وردت عن محمد^{رض} انه تقبل بنية لدفع الخصومة حتى يحضر المقر له كذا في محيط السرخسي -

If the seller is an agent of another person, then the pre-emptor is entitled to pre-empt the house from him provided the house is in his possession, because he is an *Akid* (contractor), and similarly where the seller is an executor of a deceased person, then the pre-emptor is entitled only to pre-empt those things which he is entitled to transfer. This is according to the *Sirājal Wahāj*. If the purchaser, before the pre-emptor files the suit for pre-emption says, "I have purchased this house for such and such a person," and then hands over the house to that person, thereafter the pre-emptor appears, then there can be no ground for litigation between him and the purchaser. But if the purchaser says the same after the pre-emptor had filed the suit for pre-emption, then he will continue to be a party to the suit. But if the purchaser adduces proof to the effect, that he had said the same before the sale took place, that he was an agent of such and such a person, then according to one view this evidence will not be accepted, but it is reported from Imām Muḥammad that such evidence will be accepted to suspend the litigation till the person in whose favour the admission is made

appears before the Court. This is according to the *Muḥīṭ* of *Sarakhsī*.

١٠٧ - ولو وكله
يطلب شفعة في
دار ليس له ان
يختصم في غيرها
لان الوكالة تقتيد
بالتنقييد وقد قيد
الوكالة بالدار التي
عينها ولو وكله
بالخصوصة في كل
شفعة تكون له كان
جائزأً ولو انه يختص
في كل شفعة تحدث
له كما يختص في
كل شفعة واجبة له
ولا يختص بدينين
ولا حق سوى الشفعة
لتنقييد الوكالة الا
شيء تثبيت الحق
الذي تطلب به
الشفعة اذا وكله
جلا بطلب شفعة
له فاخذها ثم جاء
مدعي يدعى في
الدار شيئاً فالوكيل
ليس بختصم له ولو
وجد شيء في الدار
عيباً كان له ان
يردها به لا ينظر
في ذلك الى غيبة
الذي وكله كذا
في المبسوط - ولو

107. If a person appoints an agent to demand pre-emption in a particular house, then he is not entitled to pre-empt another house, because agency for a particular purpose is limited to that purpose only, and the principal by specifying the house, has limited the agency ; however it will be otherwise, if the agent is given a general authority in respect of pre-emption ; but even here he cannot litigate to recover debt or any other right except that of pre-emption; since the agency is confined to pre-emption only, therefore he is entitled to litigate only for that purpose. And if the principal appoints an agent to demand pre-emption the latter pre-empts the house, thereafter a certain claimant brings a suit asserting his right in the house pre-empted, then the agent need not be made a party to the suit. And if the agent discovers some defect in the house, subject of pre-emption, then he is entitled to cancel the sale on account of the defect without waiting for the assent of the principal. This is according to the *Mabsūt*. If a person appoints

وكل رجل بالطلب كل حق له وبالخصوصية والقبض ليس له ان يطلب شفعته وله ان يقبض شفعته قد قضي بها كذلك في محيط السرخسي -
 و اذا و كله بطلب شفعة له فبحاء الوكيل قد غرق بناء الدار واحتراق تحويل الأرض فأخذ بجميع الثمن فلم يرض الموكل فهو جائز على الموكل لا يستطيع رد كذا في المبسوط ولو طلب المشتري من الوكيل بطلب الشفعة ان يكف عنه مدة علي انه على خصومة و شفعة جاز كذا في محيط السرخسي - وان مات الوكيل قبل الاجل

an agent to exercise all his rights *in praesenti* conduct litigation and take possession¹ then he is not entitled to demand pre-emption, though he is entitled to take possession of the house for which a decree of pre-emption has been passed. This is according to the *Muhit of Sarakhsī*. If a person appoints another person to demand pre-emption, and the agent turns up when the property, subject of pre-emption, is submerged under water or the trees are burnt up,² and the agent pre-empts the property at its original value, but the principal disapproves of this transaction, nevertheless it will be binding upon the principal, and he cannot cancel it. This is according to the *Mabsūt*. If the purchaser asks the agent of the pre-emptor not to file the suit for a certain length of time with the condition that the agent will retain the pre-emptive right, then such suspension is lawful. This is according to the *Muhit of Sarakhsī*. If the agent dies before the period

¹ It seems that the Agent has no power as regards pre-emption for the latter is a right *in futuro*, i.e., it only accrues after sale of the property.

² Destruction due to supernatural causes (*vis major*) and in this case the pre-emptor must pay the full sale consideration.

ولم يعلم صاحبه
بموته فهو على
شفعته فإذا مضي
الاجل وعلم بموته
فلم يطلب او لم
يبعث وكيل آخر
يطلب له فلا شفعة
له كما كان الحكم
في الابتداء قبل ان
يبعث هذا الوكيل
ومقدار المدة في
ذلك مقدار المسير
من حيث هو على
سير الناس كذلك في
المبسط -

expires and the principal was not informed of his death, then the principal will still retain his right of pre-emption. But if the period expires, and the principal comes to know about the death of the agent, and still he makes no demand of pre-emption or appoints no agent to demand pre-emption on his behalf, then his right will be extinguished. However if the principal is away in some other town, then he will be allowed a reasonable period of time sufficient to enable him to come over to the place by an ordinary mode of journey. This is according to the *Mabsūt*.

الباب

الحادي عشر

في شفعة الصبي
١٠١ - الصغير
كالكبير في استحقاق
الشفعة كذا في
المبسوط - قال و
الحبل في استحقاق
الشفعة والكبير سواء
فإن وضعت لاقل من
ستة أشهر منذ
وقع الشراء فله
الشفعة وإن جئت
به لستة أشهر
فصاعداً منذ وقع
الشراء فإنه لا شفعة
له لأنه لم يثبت
 وجوده وقت البيع
لا حقيقة ولا حكما
إلا إن يكون أبوه

CHAPTER XII

THE RIGHT OF PRE-EMPTION PERTAINING TO MINORS.

108. As regards pre-emption a minor person is on the same footing as an adult. This is according to the *Mabsūt*. And even a foetus in the womb has the right of pre-emption just like a grown-up person, provided it were born at less than six months from the time of purchase, but if born at six months or more from that date, he will have no right of pre-emption. Because in the latter case it cannot be presumed nor can it be established that the child was conceived at the time when the purchase took place.¹ However if the father dies before the sale transaction and the foetus inherits some property, then he will be entitled to pre-empt the property sold

¹ Under the Muhammadan law in order that the child should be legitimate it must be conceived in lawful wedlock and it must be born at least six months from the date of marriage. *Quære* whether a child born within less than six months of the marriage of his parents should be considered legitimate under Section 112 of the Indian Evidence Act 1872, *vide* by the present author "A Dissertation on the Muslim Law of Legitimacy" *vide* also *Saleh Muhammad vs. Muhammad Hameed*, 48 All., 625 (1926).

مات قبل البيع
ورث المكيل منه
حتى يتحقق
الشفعة وإن جاءت
بالولد لستة أشهر
فصاعدان وجوده
وقت البيع ثابت
حکماً لما ورث من
ابيه ثم إذا وجبت
الشفعة للصغير
فالذى يقوم بالطلب
والأخذ من قام
مقامه شرعاً في
استيفاء حقوقه وهو
أبواه ثم وصي ابيه ثم
جده أبوابيه ثم
وصي الحجد ثم
الذى نصبه القاضي
فإن لم يكن أحد
من هؤلاء فهو على
شفعة إذا أدرك فإذا
أدرك فقد ثبت له خيار
البلوغ والشفعة
فاختار رداً النكاح
او طلب الشفعة
فإذا كان أو لا يجوز
و يبطل الثاني
والحيلة في ذلك
إن يقول طلبهما
الشفعة والخيار
و إذا كان له أحد
من هؤلاء فترك
طلب الشفعة مع

though his birth should take place,
at six months or more from the date of
the sale ; for in this case his conception
in the womb is established impliedly.
When the right of pre-emption accrues
in favour of a minor, the person to
demand and take possession, is his own
lawful guardian, *viz.*, his father, or his
father's executor, or his paternal grandfather,
or the grandfather's executor,
and finally his guardian duly appointed
by the *Kāzī*. If there is none of these
to pre-empt on his behalf then his right
remains intact, till he attains sufficient un-
derstanding (puberty). And if the option
of puberty¹ and the right of pre-emption
accrue at the same time, he may either
rescind the contract of marriage, or
demand pre-emption, and whichever
he first mentions that takes effect, and the
other becomes void ; but this fatal conse-
quence however, may be averted thus by
saying, "I demand both of them, *Shufa'*
and the option of puberty." And if the
lawful guardian of a minor surrenders
the right of pre-emption, when able to
make, then the right becomes void, with
the result that the minor on attaining

¹ The right vested in a minor to repudiate the marriage on attaining puberty.

الامكان بطلت الشفعة حتى لو بلغ الصغير لا يكون له حق الاله وهذا قول ابي حنيفة وابي يوسف^ح اذا سلم الاب والوصي ومن هو بمعناهما شفعة الصغير صحيحة عند ابي حنيفة وابي يوسف^ح حتى لو بلغ الصبي لا يكون له ان يأخذ ثمن الشفعة سواء كان التسليم في مجلس القاضي او غير مجلس القاضي هكذا قي المحيط ولو كان المشتري اشتري الدار باكثر من قيمتها بما لا ينبع بين الناس في مثله والصبي شفيعها فسلم الاب ذلك يقول يصح التسليم هنا عند محمد^ح ايضا والاصح انه لا يصح التسليم

puberty cannot avail himself of the right of pre-emption. This is so according to Imām Abu Ḥanifa and Imām Abu Yusuf. And further according to them, if the father, or his executor, or any one coming within the meaning of lawful guardian should surrender the minor's right of pre-emption, the surrender will be valid. So that if the minor on attaining puberty will have no power to pre-empt the property sold. It is immaterial whether the surrender was made in the Kāzī's Court or elsewhere. This is according to the *Muhīt*. And if the purchaser buys a house at such a high price as people in general will not be willing to pay for it, and the pre-emptor of that house happens to be a minor, and his father surrenders his minor son's right, then some of our jurists hold that in such a case the surrender will be valid, and this is so according to Imām Muḥammad. But according to all jurists the correct view is that such surrender is invalid, for since the price is excessive, the father is deemed to have no right to pre-empt on behalf of the minor, and mere silence to demand pre-emption or its surrender is valid only where a person is able to pre-empt the property,

عند هم جميعاً لانه لا يملك الاخذ لكنثرة الثمن و سكتونه عن الطلب و تسليمه انا يصح اذا كان مالكا للاخذ فيبقى الصبي على حقه اذا بلغ كذا في المسبوط - و اذا سلم الاب شفعة الصغير و الشراء باقل من قيمته بكثير فعن ابي حنيفة^٢ انه يلتجوز وعن محمد^١ لا يلتجوز ولا رواية عن ابي يوسف^٢ كذا في الكافي -

therefore the minor when he will attain puberty, will be allowed to pre-empt it. This is according to the *Mabsūt*.

And if the father of a minor surrenders his minor son's right of pre-emption while the purchase has taken place for a very small price, then according to the report from Imām Abu Ḥanifa, the surrender is lawful, but according to Imām Muḥammad, it is not lawful, and there is no report from Imām Abu Yusuf on this point. This is according to the *Kāfi*.^١

١٠٩ - اشتري ادارا
الابن الصغير والاب
شفعيها كان للاب
ان يأخذها بالشفعة
عند ما كمال اشتري
الاب مال ابنه لنفسه

109. A father purchases a house for his minor son, and the father himself is its pre-emptor, then according to us,^٢ the father is entitled to pre-empt the house. This is similar to the case of a father purchasing the property of his

¹ Under the Anglo-Muhammadan Law it seems that in all these cases the surrender will be deemed to be lawful and the minor will have no right to demand pre-emption on attaining puberty.

² The Hanafi jurists.

ذه كيف يأخذ
يقول اشتريته و
أخذت بالشقة و
لو كان مكان الاب
وصيه ان كان في
أخذ الوصي هذه
هذه الدار منفعة
للصغير بان وقع
الشراء بغير يسير
بان كان قيمة الدار
مثلا عشرة وقد
اشترى الوصي باخذ
عشر فان الغبن
اليسير يتتحمل من
الوصي في تصرفه
مع الآجانب ويأخذ
بالشقة
الوصي يرتفع ذلك الغبن
فاذما كانت الحالة
هذه كان اخذ
الوصي بالشقة
منتفعا به في حق
الصغير و كان للوصي
ان يأخذ بالشقة
على قياس قول ابي
حنيفة^ج واحدي
الروابطين عن ابي
يوسف^ج كما في
شراء الوصي شيئا
من مال الصغير
لنفسه وان لم يكن
في اخذ الوصي
هذه الدار بالشقة
منفعة في حق
الصغير بان وقع
الشراء الدار للصغير

minor son for himself. Now the question arises as to how he should pre-empt the house, and the answer is that the father should say "I purchase it and I pre-empt it." If in the place of a father there was his executor and the fact of his pre-empting the property were in the interest of the minor, e.g., the price of the house was 10 *dirhams*, but the executor purchased it for 11 *dirhams*, then since the actual price of the house was 10 *dirhams* and the executor had purchased it for 11 *dirhams*, then his act in pre-empting the property was obviously in the interest of the minor. Hence according to the view of Imām Abu Ḥanifa based on *Qias* and one of the two reports from Abu Yusuf, the executor is entitled to pre-empt just in the same way as he is legally entitled to purchase the property of a minor for himself. However if the exercise of the right of pre-emption is disadvantageous to the minor, e.g., the purchase of the house for the minor took place for a fair (equal) value, then according to the consensus of opinion, the executor is not entitled to pre-empt it just in the same way as the executor is not allowed to purchase for himself

بمثل القيمة لا يكون
للوصي الشفعة
بالاتفاق كما لا يكون
للوصي ان يشتري
شيئا من مال اليتيم
لنفسه بمثل القيمة
بالاتفاق و متى كان
للوصي ولایة الاموال
يقول اشتريت و
طلبت الشفعة ثم
يفرغ الامر الى القاضي
حتى ينصب فيما
عن الصبي فيأخذ
الوصي منه بالشفعة
ويسلم الثمن اليه
ثم القيم يسلم
الثمن الى الوصي
هكذا في المحيط -
اشتري الاب و اراد
ابنه الصغير شفيعها
فلم يطلب الشفعة
للصغير حتى
بلغ الصغير
فليس الذي بلغ
ان يأخذها بالشفعة
لان الاب كان
متوكلا من اخذها
بالشفعة لان الشراء
لا ينافي الارث
بالشفعة فسكته
يكون مبطلا للشفعة
ولو باع الاب دارا
لنفسه وابنه الصغير
شفيعها فلم يطلب
الاب الشفعة للصغير

the property of a minor at its fair value.
This is the view according to all jurists.
Hence where the executor is allowed to
pre-empt he should say, "I purchased
it, and now demand pre-emption,"
and then refer the matter to the *Kāzī*,
who will appoint a Curator on behalf
of the minor and from whom the executor
might pre-empt the property and pay
the price to him, and thereafter the
Curator will entrust the price to the
executor. This is according to the *Muhīt*.
If a father purchases a house and his
minor son is its pre-emptor, and the father
does not pre-empt the house on behalf of
his minor son then the son, on attaining
majority (puberty) will not be entitled
to pre-empt the house, because his father
had the power to demand it in pre-emption,
since nothing prevented the father from
demanding pre-emption, and his silence
has invalidated the right of pre-emption.
And if the father sells a certain house
of his own, of which his minor son
is its pre-emptor and the father does
not claim pre-emption (on behalf of his
minor son), then the minor's right of
pre-emption is not invalidated, and he
on attaining majority (puberty), will
be entitled to pre-empt it, because in

لا تبطل شفعة الصغير حتى بلغ الصغير كان له ان يأخذها لان الاب هنا لا يتمكن من الاخذ بالشفعة لكونه بائعاً وسكت من لا يملك الاخذ لا يكون مبطلاً واما الوصي اذا اشتري داراً لنفسه او باع الدار له والصبي شفيعها فلم يطلب لوصي شفعته فاليلتيم على شفعة اذا بلغ كذلك في الذخيرة - وهكذا في محظى السرخيسي -

١١٠ - ويحجب ان يكون الجواب في شراء الاب داراً لنفسه وابنه الصغير شفيعها على التفصيل ان لم يكن للصبي في هذا الاخذ ضرر بان وقع شراء الاب الدار بمثل القيمة او باكثر من القيمة مقدار ما يتغابن الناس في مثله لا تكون لمصغير الشفعة اذا بلغ وان كان للصغير في هذا

this case the father had no power to pre-empt for he was himself the seller and the silence of such person who is not able to demand pre-emption cannot extinguish the pre-emptive right of another person. And if the executor sells a certain house or purchase it for himself, while his ward (minor) is its pre-emptor, and he does not demand pre-emption on behalf of his ward, then the ward will retain his right of pre-emption until he attains majority (puberty). This is according to the *Zakhira* and the *Muhit* of *Sarakhsī*.

110. Therefore the law appears to be that where the father purchases a house for himself while his minor son is its pre-emptor, then if there will be no harm to the minor son's in pre-empting the father's purchase, that is when the price of the house is fair or is such that its value is tolerable in the general estimation of the people, then the minor son even after attaining majority (puberty) will be entitled to pre-emption, notwithstanding his father's implied surrender, but if there is a likelihood of some harm to the minor in pre-empting his father's

الاخذ ضرر بان
وقع شراء الاب
بماكثر من القيمة
مقدار مالا يتغابن
الناس فيه كان
له الشفعة اذا
بلغ لان الاب
لا يملك الصرف في
مال الصغير مع
نفسه على وجه
الضرر فلم يكن
الاب متمكننا في
الاخذ في هذه
الصورة فلا يكون
سكتة مبطلا للشفعة
كذا في المحيط --
ادا قال
الاب او الوصي
اشترت هذه الدار
بالف درهم للصغير
فقال له الشفيع
اتق الله فاذك
اشترى بها بخمسة
قصدقة لا يصدق
ويأخذ الدار بالف
درهم حتى يقيم
البينة على المشتري
بخمسة كذا
في الناقار خانية -
الاب اذا
اشترى لابنه الصغير
دارا ثم اختلف
مع الشفيع في
الثمن فالقول قول

purchase, that is if the father has paid for the house such an amount that people in general will not be inclined to pay, consequently the father did not demand pre-emption on behalf of his minor son, then the latter on attaining majority (puberty) will have no right of pre-emption, because the father (in the capacity of the lawful guardian is not authorised to deal with the property of the minor son to (his son's) disadvantage. This is according to the *Muhit*. If a father or an executor says, "I have purchased this house for 1000 *dirhams* for this minor," and the pre-emptor says, "Fear God, you have purchased it for 500 *dirhams*," then if the father or the executor admits this statement, it cannot be binding as against the minor, and the pre-emptor will have to pre-empt it for 1000 *dirhams*; however if the pre-emptor adduces proof that the property was actually purchased for 500 *dirhams* only, then such proof will be accepted. This is according to the *Tatār Khāniyya*. If a father purchases a certain house for his minor son, and the pre-emptor disputes its price, then the word of the father will be accepted, as he denies the claim of the pre-emptor for the price offered for it, and

الاب لانه ينكر
التملك للشفيع
بما يدعوه ولا يمين
عليه لأن النكول
لا يفيد كذا في
المحيط

the father is not bound to swear and his refusal to take the oath will be of no consequence. This is according to the *Muhīt*.

الباب

الثالث عشر

في حكم الشفعة
وإذا وقع الشراء
بالعروض

111 - من اشتري
لا يخلو ما
ان يكون بمثابة مثل
المكيلات والموزونات
والعدديات المتنقارية
وامان يكون بما لا يمثل
له كالمدر وعات
المتفاوتة كالثوب
والعبد ونحو ذلك
فإن كان بما له مثل
فالشفعي يأخذ بمثله
وان كان بما لا يمثل
له يأخذ بقيمةه عند
عامة العلماء ولو
تباععا دارا بدار
فلشفعي كل واحدة
من الدارين ان
يأخذ بقيمتها لأن
الدار ليست من
ذوات الأمثال فلا
يمكن الأخذ بمثلها
وعلي هذا يخرج
ما لو اشتري دارا
بعرض ولم يتقدما
حتى هلك العرض
بطل البيع فيما
بين البائع والمشتري

CHAPTER XIII OF PRE-EMPTION IN CASE OF EXCHANGE OF COMMODITIES.

111. If a person exchanges property, it will be obviously for something that belongs to the "Class of Similars," e.g., things estimated by a measure of capacity or weight or number, or for something that belongs to the "Class of Dissimilars," e.g., grain in general, a piece of cloth, a slave, or similar things. According to our jurists in the former case pre-emption is allowed at a similar thing, and in the latter case pre-emption is allowed, at its value. If a mansion were exchanged for another, then the pre-emptor of each shall pay its value because mansions are not of the "Class of Similars." And when a mansion is sold for a chattel, the pre-emptor is allowed to pre-empt it for the value of the chattel. And if the chattel actually perishes before its delivery to the purchaser, then between the seller and purchaser the sale would be cancelled, nevertheless the pre-emptor is entitled to pre-empt the mansion for the value of the chattel. And similarly if the

وللشفيع الشفعة
وكذا لو كان
المشتري قبض الدار
ولم يسلم العرض
حتى هلك ثم
الشفيع إنما يأخذ
بما وجب بالعقد
لا بما اعطى بدلًا
من الواجب حتى
لو اشتري الدار
بالدرارهم أو الدنارين
ثم دفع مكانته
عرضًا فالشفيع يأخذ
بالدرارهم لا بالعرض
كذا في البدائع -
وإذا اشتري
داراً بعد بعينة
فللشفيع أن يأخذها
بالشفعة بقيمة العبد
عندنا فان مات
العبد قبل ان
يقبضه البائع انتقض
الشراء وللشفيع
ان يأخذها بقيمة
العبد عندنا و كذلك
ان ابطل البائع البيع
بعيب وجدة بالعبد
وان لم يكن شيئاً
من ذلك واخذ
الشفيع الدار من

vendee takes possession of the mansion, and does not deliver to the vendor the chattel which meanwhile perishes, nevertheless the pre-emptor would still pre-empt the property for the value of the chattel. The pre-emptor is to take the property for the agreed consideration and not in lieu of anything which subsequently has been given instead of it. Thus if a person purchases a mansion for *dirhams* or *dinars*, and afterwards delivers instead of the amount a certain chattel, nevertheless the pre-emptor can pre-empt the mansion for *dirhams* and not for the value of chattel. This is according to the *Badayi'*. If a house is exchanged for a particular slave, the pre-emptor may pre-empt it for the value of the slave ; even though the slave were to die before seller takes its delivery, and whereupon the sale between the seller and purchaser would be cancelled, nevertheless the pre-emptor according to our jurists is entitled to take the house for the value of the slave. Similarly if the seller invalidates the sale on account of some defects discovered in the slave, and returns him to the purchaser, nevertheless the pre-emptor is entitled to take the house for the value of the slave ; however if none

البائع اخذها بقيمة
والعبد لصاحبه
لا سبيل للمبائع
عليه وان اخذها
من المشتري بقيمة
العبد لقضاء او
بغير قضاء ثم مات
العبد قبل القبض
او دخله عيب فان
القيمة للبائع كذا
في المبسوط - قال
محمد في الاصل اذا
اشتري الرجل ارارا
بعيد بعيدة واحد
الشيفع الدار بقيمة
العبد بقضاء القاضي
ثم يستحق العبد
بطلت الشفعة واحد
الدار من الشفيع
وهذا اذا اخذ
الشيفع الدار بقيمة
العبد بقضاء القاضي
وان كان المشتري
قد سلم الدار
الي الشفيع بقيمة
العبد بغير قضاء
ان كان قد سمي
للشفيع قيمة العبد
كذا وكذا حتى
صار الثمن معلوما

of these incidents happen, then the pre-emptor is entitled to pre-empt the house from the buyer, in lieu of the value of the slave, who will remain with his previous owner, and the purchaser will have no right against him (slave). If the pre-emptor takes the house from the purchaser for the value of the slave under the decree of the Kazi, or by mutual arrangements, and then the slave happens to die before possession is taken of him or a defect is found in him, then its price should be paid to the seller. This is according to the *Mabsūt*. Imam Muhammad has stated in the *Asl* that when a house is exchanged for a slave and the pre-emptor pre-empts the house for the value of the slave under the decree of the Kazi, and afterwards the slave is claimed by another person, the decree of pre-emption will be annulled and the house will be taken back from the pre-emptor. This effect follows when the pre-emptor takes the house in lieu of the value of the slave in accordance with the decree of the Kazi.. But if the purchaser delivers the house to the pre-emptor voluntarily in lieu of the value of the slave, which has been made known to the pre-emptor,

من كل وجه ثم استحق العبد ليس للمشتري على الدار سبيل ويجعل ذلك بيعاً مبتدأً ويكون للبائع على المشتري قيمة الدار وإن لم يكن سبيلاً للشقيقين قيمة العبد كذا وكذا ولكن قال سلمت الدار لك بقيمة العبد كان للمشتري أن يسترد الدار من الشقيقين كذا في المحيط -

١١٢ - وإن اشتري عبداً بعد ثم وجد بالعبد عيباً فـ ٥٥
أخذها الشقيق بقيمة العبد صحيحاً لأن العبد دخل في العقد بصفة السلامة وإنما يقوم في حق الشفيع على الوجه الذي صار مستحقاً بالعقد ولو اشتري عبداً بدار فهو هذا وشراء الدار بالعبد سواءً كذا في المسوط - فإذا اشتري داراً بعد غيره واجاز

that is, the value is ascertained, and thereafter the slave is claimed by another and is taken possession of, in such circumstances the purchaser will not be entitled to the house for his act (voluntary transfer) will be considered as a sale *de novo*, and the seller is entitled to receive the price of the house from the purchaser. However, if the value of the slave has not been mentioned to the pre-emptor, and the purchaser delivers the house to him in lieu of the value of the slave, then the purchaser has the right to reclaim the house from the pre-emptor. This is according to the *Muhīt*.

112. If a house is exchanged for a slave, and thereafter the slave is returned on account of some defect subsequently found in him, then the pre-emptor will take the house for the value of a sound slave; because the slave was entered into the contract as sound, and with respect to the pre-emptor he stands in the same condition, whereby a right to him was acquired under the contract. If a slave was exchanged for a mansion, then this case and the purchase of a mansion for a slave are both alike. This is according to the *Mabsūt*. If a

صاحب العبد الشراء فللشبيع الشفعة اذا وقع الشراء بمكيل او موزون بعينه استتحق المكيل والوزن فقد بطلت الشفعة لان المكيل والوزن اذا كان بعينه فهو والعبد سواء وان كان المكيل والموزن في الذمة فاوفاه ذلك ثم استتحق بذلك فشفعة الشبيع على حالة لان المكيل والوزن اذا كان في الذمة فهو والدرارهم سواء وفي المتنقي بن سماعة عن محمد² في رجل اشتري من آخر دارا بالكونة يكر حنطة بعينه او بغير عينه وتقابضا ثم خاصمه الشبيع في الدار بمرو فقضى له عليه بالشفعة والدار

person exchanges a house for a slave, which is owned by another person who confirms the transaction, then the pre-emptor will be entitled to pre-emption. If the exchange of some property takes place for a definite thing capable of being estimated by a measure of capacity or weight, and then if such a thing is reclaimed on proof of ownership by another person, the right of pre-emption will be extinguished because a definite thing is treated in the same way as a slave. But if the thing in lieu of exchange is due from the purchaser and he delivers it to the seller, afterwards it is reclaimed on proof of ownership by another person, then the right of pre-emption cannot be affected in any way, because a thing, subject of exchange, duly delivered by the purchaser, is treated in the same way as *dirhams*. It is reported in the *Muntaqa* by Ibn Sama'a that according to Imām Muḥammad if a person purchases from another person a house in Kufa for ascertained or unascertained quantity *Kar*¹ of wheat, and both of them respec-

¹ A measure of capacity consisting of six ass-loads (Lane's Arabic-English Lexicon).

بالكوفة او بمراد قال
ان شاء المشتري
أخذ الشفيع حتى
يأخذ منه حنطة
ممثلها بالكوفة وسلم
له الدار بمراد وان
شاء سلم له الدار
واخذ منه بمراد
قيمة الحنطة بالكوفة
 وسلم وقال في
موضع آخر من
المنقى ان كان
قيمة الكر في
الموضعين سواء اعطاه
الكر حيث قضى
له بالشفعه فان
كانت القيمة متفاصله
نظر في ذلك ان
كان الكر في الموضع
الذى يريد الشفيع
ان يعطي اغلى
فذلك الى الشفيع
يعطيه ذلك حيث
شاء وان كان ارخص
فرضي به المشتري
فذلك اليه وان
تساويا اعطي
المشتري قيمة ذلك
في الموضع الذي
فيه مسايساوي في موضع
الشراء كذا في
المحيط - ولتواثرى

tively interchange possessions, thereafter the pre-emptor brings a suit for pre-emption in Marv and the suit is decreed against the purchaser. And it is immaterial whether the house is situated in Kufa or Marv, the purchaser is entitled to demand an equal quantity of wheat in Kufa, and after having done so he should deliver the house pre-empted to the pre-emptor in Marv. And if he desires he may deliver the house to the pre-emptor in Marv and take the price of the wheat at the rate available in Kufa. And it is reported in the *Muntaqa* that if the current price of one *Kar* of wheat is the same in both the places, then the pre-emptor should deliver the *Kar* of wheat at the place where he obtains the decree. And if there is any difference in the price, and the rate of the wheat in the place where the pre-emptor wishes to give is high, then the pre-emptor is entitled to give the wheat at either place at his pleasure, but if the wheat were cheaper at a certain place and the purchaser also agrees then he may take it there, and if the price were the same then the pre-emptor may give the value of wheat at any place to the purchaser. This is according to the

دارا بكر من
رطب فجاجة اشفيع
بعد ما انقطع
الرطب من ايدي
الناس فانه يأخذ
الدار بقيمة الرطب
هكذا في الكافي -

Muhit. If a person purchases a house for a *Kar* of dates, and the pre-emptor appears after they were consumed, then he will be entitled to pre-empt the house on paying the value of the dates. This is according to the *Kāfi*.

في الشفعة في
فسخ البيع والا
قالة وما يحصل بذلك
١١٣ - مشتري
الدار اذا وجد
بالدار عيبا بعد
ما قبضها وردها
بالعيوب وكان ذلك
بعد ما سلم الشفيع
الشفعة فللشفيع
ان يأخذها بالشفعة
ان كان الره
بالعيوب بغير قضاء
قضاء ولو كان الره
بقضاء قاض فليس
للشفيع ان يأخذها
وان كان الره
بالعيوب قبل قبض
الدار وان كان
بقضاء فلا شفعة
للشفيع وان كان
بغير قضاء بذلك
عند محمد^و اما
على قول ابي حنيفة
وابي يوسف^و قد
اختلف المشائخ
بعضهم قالوا للشفيع
الشفعة وبعضهم

CHAPTER XIV

OF THE VOIDABILITY AND REVOCATION OF SALE AND OTHER THINGS PERTAINING TO IT.

113. If the purchaser after taking possession discovers some defect in the property, and returns it because of the defect, and this fact is known after the pre-emptor relinquishes his right of pre-emption, then the pre-emptor will be entitled to pre-empt the property provided it has not been returned under the decree of the Kazi; for if returned under the decree of the Kazi, the pre-emptor cannot pre-empt it. If the purchaser before taking possession returns the property on account of some defect, then the pre-emptor will not be entitled to pre-empt, if the return was effected by the decree of the Kazi, but if it was effected voluntarily, even then Imām Muhammad holds the same view, however our jurists differ on this point on the authority of Imām Abu Hanifa and Imām Abu Yusuf. Some hold that there is pre-emption, and others say that there is no right of pre-emption. If the purchaser returns the property on account of the options of inspection or condition, then

قالوا لا شفعة للشفيع وان كان المشتري رده الدار بخيار رؤبة او بخيار شرط لا يتتجدد للشفيع حق الشفعة حصل الرد قبل القبض او وبعد القبض بترا ضيئما او بغير ترا ضيئما كذا في المحيط - اذا سلم الشفيع الشفعة ثم ان المشتري رده الدار على البائع ان كان الرد بسبب هو فسخه جديد من كل وجها نحو الرد بخيار الروية وبخيار الشرط وبالعييب قبل القبض بقضاء او بغير قضاء وبعد القبض بقضاء لا يتتجدد للشفيع حق الشفعة وان كان الرد بسبب هو بيعه جديد في حق الثالث نحو الرد بالعييب بعد القبض بغير قضاء وبالرد بحكم الاقالة يتتجدد للشفيع حق الشفعة واما اذا لم يسلم الشفيع

the pre-emptor will not be entitled to pre-empt the property irrespective of the fact whether the return takes place before or after delivery of possession, and whether it was effected voluntarily or not. This is according to the *Muhit*. If the pre-emptor surrenders his right of pre-emption, thereafter the purchaser returns the property, and if the cause of return is such as renders the sale absolutely void, such as the options of inspection or condition, or the return is on account of a certain defect before taking possession whether by the decree of the Kazi or voluntary, or it is on account of some defect discovered after delivery of possession, by the decree of the Kazi, in all these cases the pre-emptor will not be entitled to pre-empt the property at all. If the return takes place on account of some cause which renders the transaction voidable as between the seller and the purchaser, then it tantamounts to a new transaction with reference to a stranger, e.g., after taking possession the return is effected voluntary on account of some defect, or the return is in accordance with some agreement, then the pre-emptor will be entitled to pre-empt the property

الشفعه حتى فسخ
البائع والمشتري
العقد بينهم لا يبطل
حق الشفعه سواء
كان الفسخ بسبب
هو فسخ من كل
وجه او بسبب هو
فسخ من وجه محدد بهذه
من وجهاً كذا في
الذ خيرة - و اذا
اشترى الرجل
دار ارضا فسلم
الشفيع الشفعه
ثم ان البائع
والمشتري تصادقا
ان البيع كان تلبيسته
وردا المشتري الدار
علي البائع لا يتتجده
للشفيع حق الشفعه
لان بعد تسليم
الشفعه لم يمك
للشفيع حق اصلاح
فاقرار هما لا تيخص من
بطلان حقه فثبتت
التلبيسته با اقرار
هما فكان الده بسبب
التلبيسته فلا يتتجده
به حق الشفيع وفي
المنتقى رجل اشتري
دار او قبضها وسلم
الشفيع الشفعه ثم

de novo. If the pre-emptor does not give up his right of pre-emption until the seller and the purchaser mutually rescind the sale, then the right of pre-emption will not be extinguished. It is immaterial whether the cancellation took place on account of some cause, which renders the transaction absolutely void, or which renders the transaction voidable, or renders it as if sale *de novo*. This is according to the *Zakhira*. If a person purchases a house or land, and the pre-emptor relinquishes his right, thereafter, the seller and purchaser mutually allege that the sale was a mere agreement between them, and the purchaser returns the house to the seller, then the pre-emptor has no right of pre-emption afresh, for no right of pre-emption survives after its relinquishment, and further mere agreement does not give rise to pre-emption, and this was a mere agreement according to their own admissions, and hence the pre-emptor has no right of pre-emption. It is reported in the *Muntaqā* that if a person purchases a house and takes its possession, and the pre-emptor surrenders his right of pre-emption, thereupon the purchaser says, "I have purchased it for another," while

ان المشتري قال
انما كنت اشتريتها
لفلان وقال الشفيع
لا بل اشتريتها
لنفسك وهذا منك
بيع مستقبل وانا
أخذها بالشقة
بهذا البيع فالقول
قول الشفيع فان
كان فلان غائبا لم
يكن الشفيع ان
يأخذ الدار حتى
يقدم الغائب وان
قال المشتري اذا اقيم
البيعة ان فلانا كان
امرني بذلك واني
اشتريتها لها لم تقبل
بینته على ذلك حتى
يحضر فلان كذا
في المحيط - ولو سلم
الشفيع الشقة ثم
جعل المشتري للبائع
خياريوم جاز فان
نقض البائع البيع
في ذلك اليوم لا
يتتجدد للشفيع
حق رواه بن سماعة
عن محمد^{و روی}
الحسن عن ابي
حنيفة^{و ابن}
سماعة عن ابي
يوسف^{ان فيه}
الشقة كذا في
محيط السريري -

the pre-emptor says, "No, you have purchased it for yourself, and now you are selling it again. So I will pre-empt the house under this new sale," then in this case, the word of the pre-emptor would be accepted. However if the vendee were absent, the pre-emptor will not be entitled to pre-empt it until he turns up. And if the purchaser says, "I will adduce proof that I purchased this house under the order of that person," then such evidence will not be admissible unless that person presents himself. This is according to the *Muhīt*. If the pre-emptor relinquishes his right of pre-emption, thereafter the purchaser allows a day's option to the seller, such option is lawful ; if the seller cancels the sale during that period, then Ibn Samā'a reports that according to Imām Muham-mad the pre-emptor will not be entitled to demand pre-emption *de novo*, but, Hasan bin Ziyād reports from Imam Abu Hanifa and Ibn Samā'a also reports from Imām Abu Yusuf that the pre-emptor will be entitled to demand pre-emption. This is according to the *Muhīt* of Sarakhsī.

الباب

الخامس عشر

في شفعة أهل الكفر -
١١٣ - اذا اشتري
نصارى من نصارى
دارا ببيته او دم فلا
شفعة للشافع اشتري
دمي من ذمه ١٥ دارا
بخمس و تقادضا ثم
صار الخصم خلا ثم
اسلم البائع والمشتري
ثم استحق نصف
الدار و حضر الشافع
اخذ نصف بنصف
قيمة الخمر ولا يأخذ
بنصف الخل ثم
يرجع المشتري على
بائع بنصف الخل
ان كان الخل
قائما في يده و ان
كان مستهلكا رجع
عليه بمثل نصف
الخل كذا في
المحيط -

CHAPTER XV

OF PRE-EMPTION BY NON-MUSLIMS

114. If a Christian exchanges a house from another Christian for a carrion or for blood, the (Muslim) pre-emptor is not entitled to pre-empt it.¹ If a *Zimmī*² purchases a house from another *Zimmī* for wine, and they mutually interchange possession, subsequently the wine turns into vinegar, and both the seller and the purchaser embrace Islam, meanwhile half of this house is reclaimed by another person on proof of ownership, thereafter the pre-emptor turns up, then he will be entitled to pre-empt half the house for half the value of the wine, but cannot take for half the value of the vinegar. The purchaser would reclaim half the vinegar from the seller if still unconsumed, and if the seller

¹ It seems that the author contemplates that this transaction takes place between non-Muslim aliens residing in a Muslim State, for a Christian subject of a Muslim State is known as a *Zimmī* and in this case there is a right of pre-emption.

² All non-Muslim subjects of a Muslim State are under the protection of the law in the same way as Muslim subjects.

ولو اشتري ذمي من ذمي ٥ أرا
ب الخمير او خنزير و شفيعها ذمي او مسلم وجبت الشفعة عند اصحابنا
ثم اذا وجبت الشفعة فان كان الشفيع ذميا اخذ الدار بمثل الخمير وبقيمة الخنزير و ان كان مسلما اخذ هابقيمة الخمير والخنزير كذا في البدایم -
دار بيعت بخمیر و لها شفیعان مسلم و کافر اخذ الكافر نصفها به نصف الخمیر و اخذ المسلم نصفها بنصف قیمة الخمیر وان كان الثمن خنازیر اخذ كل واحد بنصف القيمة كذا في سحيط السرخيسي - وان كان شفيعها مسلما و ذميا فاسلم الذمي اخذها بنصف قیمة الخمیر كما لو

has consumed it, the purchaser would claim an equal amount of similar vinegar. This is according to the *Muhīt*. If a *Zimmī* exchanges a house from another *Zimmī* for wine or for a pig and the pre-emptor is either a *Zimmī* or a Muslim, then according to our jurists (*Hanafi*) the right of pre-emption arises. If the pre-emptor is a *Zimmī*, then he will pre-empt the house for the equivalent quantity of similar wine or for the value of the pig ; but if the pre-emptor is a Muslim, then he will pre-empt the house for the value of the wine or the pig. It is so mentioned in the *Badāy'i*. A house is exchanged in lieu of wine and it has two pre-emptors, one being a non-Muslim, and the other a Muslim. The non-Muslim will pre-empt half the house for half the quantity of similar wine, while the Muslim will pre-empt the other half for half the value of the wine. If the exchange is in lieu of a pig, then each pre-emptor will pre-empt for half the value of the pig. This is according to the *Muhīt* of *Sarakhsī*. If there are two pre-emptors of a house, one is a Muslim and the other is a *Zimmī*, subsequently the *Zimmī* embraces Islam, then the *Zimmī* is also entitled to pre-empt half the house for half the

كان مسلماً عند العقد ولا تبطل شفعته هكذا في الكافي - واداً اسلم احد المتباهييين والخمر غير مقبوسة والدار مقبوسة او غير مقبوسة انتقض البيع، ولكن لا يبطل حق الشفيع في الشفعة فيأخذها الشفيع بقيمة الخمر ان كان هو مسلماً او كان الماخوذ منه مسلماً وان كانوا كافريين اخذها بمثل ذلك الخمر وان كان اسلام احد المتعاقديين بعد قبض الخمر قبل فرض الدار فالبيع بينهما يبقى صحيحاً واداً باع الذي كانيسة او بيعة او بيت نار فالبيع جائز وللشفيع فيها الشفعة كذا في المبسوط -

value of the wine, as he would have been entitled to do so, had he been a Muslim at the time of sale. This is according to the *Kāfi*. If a house is exchanged for wine and either the seller or purchaser embrace Islam before possession of wine is taken, then the sale will be cancelled whether possession of the house has been delivered or not, but the pre-emptor's right of pre-emption will not be invalidated, and hence, if the pre-emptor were a Muslim or the person from whom he demands pre-emption were a Muslim, the pre-emptor will be entitled to pre-empt the house for the value of the wine, and if both were non-Muslims, then the pre-emptor will pre-empt in lieu of an equal quantity of similar wine. If after delivery of wine and before taking possession of the house either the seller or purchaser embrace Islam, then the transaction of exchange remains valid. If a *Zimmī* sells¹ a *Kanisa* or *Bey'at* or *Baitunnar*, the sale is valid and the right of pre-emption arises. This is according to the *Mabsūt*.

¹ Places of worship of the Christians, Jews and Parsees respectively.

١١٥ - ولو اشتري المرتد ثم قتل لم تبطل شفعة الشفيع لأن الشفعة متعلقة بخروج المبيع وقد خرج، انفساخ العقد، بعد لا يوجب بطلان الشفعة ولو باع المرتد ثم قتل او لحق بدار الحرب لا شفعة فيها عند ابي حنيفة^٢ كذلك في محيط السرخسي - و ان اسلم المرتد البائع قبل ان يلحق بدار الحرب جاز بيعه وللشفيع فيها الشفعة ولو كان اسلامه بعد ما لحق بدار الحرب وقسمة ماله لم يكن للشفيع فيها شفعة، وعند ابي يوسف، و محمد^٢ بيعه جائز وللشفيع فيها

115. If a *Murtadd*¹ purchases a house and afterwards he is put to death, nevertheless the pre-emptor's right will not be annulled, because the right of pre-emption appertains to the sale of the property which has already taken place, and any subsequent effect on the contract cannot invalidate the right of pre-emption. If a *Murtadd* sells the house and afterwards is put to death or he retires into *Dār-ul-Harb*,² then according to Imām Abu Ḥanifa the right of pre-emption does not arise. This is according to the *Muhit* of *Sarakhsī*. If a *Murtadd* again becomes a Muslim before he retires into *Dār-ul-Harb*, then the sale will be deemed to be valid, and the right of pre-emption will arise. If after entering *Dār-ul-Harb* and after the distribution of his property, the *Murtadd* seller becomes a Muslim, then no right of pre-emption will arise; but according to the two disciples the sale will be considered lawful and the right of pre-emption will arise, it is immaterial whether he embraces Islām or retires into *Dār-ul-Harb*. If a Muslim

¹ A Muslim who has renounced Islām.

² All non-Muslim States are denominated as *Dār-ul-Harb*, while Muslim States are known as *Dār-ul-Islām*.

الشفعه اسلم او لحق بدار الحرب واذا اشتري المسلم دار او المرتد شفيعها وقتل في ردها او مات او لحق بدار الحرب فلا شفعه فيها له ولا لورثة ولو كانت امراة مرتدة وجبت لها الشفعه فلذلك بدار الحرب بطلت شفعتها وان كانت المرتدة بائعة الدار فللشفعه الشفعه وان كان الشفيع مرتد او مرتدة فسلم الشفعه جاز ولو لم يسلم وطلب اخذ الدار بالشفعه لم يقض له القاضي بذلك الا ان يسلم فان ابطل القاضي شفعته ثم اسلم فلا شفعه له وان وقفه القاضي حتى ينظر ثم اسلم فهو على شفعه وهذا اذا كان طلب الشفعه حين علم بالشراء فان لم يكن طلب الى ان اسلم فلا شفعه له لتركه طلب المواتبة بعد

purchases a house, and its pre-emptor is a *Murtadd* who is put to death on account of having renounced the faith, or he dies a natural death, or retires into *Dār-ul-Harb* then his right of pre-emption is thereby extinguished, and his heirs will not be entitled to claim pre-emption. If a woman *Murtadd* has the right of pre-emption and she retires into *Dār-ul-Harb* her right will be annulled. If such woman *Murtadd* sells a house, the pre-emptor has a right to pre-empt it. If a *Murtadd* whether male or female were a pre-emptor and he or she relinquishes his or her right of pre-emption, such relinquishment will be lawful; and if he or she does not surrender the right and demands the property in pre-emption, then the *Kazi* will not pass a decree of pre-emption in his or her favour, but if he or she again embrace *Islām*, then the *Kazi* will decree pre-emption, but if the *Kazi* has already annulled his or her right of pre-emption, thereafter he or she again become Muslim, then they will have no right of pre-emption. If the *Kazi* allows time for the *Murtadd* to think over the matter, thereafter he or she accepts Islam, then the right of

علمه بالشراء ولو
ل الحق المرتد بدار
الحرب ثم بيعت
الدار قبل قسمة
ميراثه كان لورثته
الشفعية فإذا اشتري
المرتد ١٥١ من
مسلم أو ذمي بخمر
فالبيع باطل ولا
شفعية فيها كذا
في المبسوط -

pre-emption arises provided pre-emption was demanded immediately on receiving the information of sale, but if no demand was made until he or she again become Muslims, then the right of pre-emption had been extinguished because pre-emption was not demanded immediately after the information. If a *Murtadd* enters into *Dār-ul-Harb*, and a part of his property is sold before the distribution of his property among his heirs, then the right of pre-emption will arise in favour of his heirs. If a *Murtadd* exchanges a house in lieu of wine from a Muslim or a *Zimmī*, then since such an exchange is void no right of pre-emption will arise. This is according to the *Mabsūt*.

١١٦ - إذا اشتري الحربي
المستأمان دارا
ول الحق بدار الحرب
فالشفيع على شفعته
متى لقيه لأن
لحاقه بدار الحرب
كموتة و موت
المشتري لا يبطل
شفعية الشفيع كذا
في المحيط -
و إذا اشتري

116. If a *Harbi Mustāmin*, alien,¹ purchases a house, and subsequently retires into *Dār-ul-Harb*, then the pre-emptor would retain his right of pre-emption, and he may demand pre-emption whenever he meets the vendee, because his retirement into *Dār-ul-Harb* amounts to his civil death, and civil death of the purchaser does not extinguish the right of pre-emption. This is according to the *Muhīt*. If a Muslim purchases a house

¹ Those aliens who are protected by the Islamic law.

ال المسلم في دار
الاسلام دار او شفيعها
مستامن حربي
فلحق بدار الحرب
بطلت شفعته علم
بالشراء اولم يعلم
و اذا اشتري الحربي
المستامن دارا
و شفيعها حربي
مستامن فلحقها
جميعا بدار الحرب
فلا شفعة للشفيع
فيها لأن لحاق
الشفيع بدار
الحرب كموته فيما
هو في دار الاسلام
والدار في دار
الاسلام وان كان
المشتري مع الشفيع
في دار الحرب
فإن كان الشفيع
مسلم او دميا
فدخل دار الحرب
 فهو على شفعته
اذا علم فان دخل
و هو يعلم فلم يطلب
حتى غاب بطلت
شفعته و اذا طلب
الشفعة ثم عرض
له سفر الى دار
الحرب او الى
غيرها فهو على
شفعته اذا كان
على طلبه و اذا
كان الشفيع حربيا

in *Dār-ul-Islam* and its pre-emptor is a *Harbī Mustāmin*, and he has retired into *Dār-ul-Harb*, then thereby his right of pre-emption will be annulled; it is immaterial whether he was informed of the sale or not. If a *Harbī Mustāmin* purchases a house, and the pre-emptor also is a *Harbī Mustāmin*, and thereafter both retire into *Dār-ul-Harb*, then the pre-emptor will have no right of pre-emption, because his retirement into *Dār-ul-Harb* is like civil death of a person in *Dār-ul-Islām*, for the house is in *Dār-ul-Islām*. If both the pre-emptor and the purchaser are in *Dār-ul-Harb*, and the pre-emptor is either a Muslim or a *Zimmī* who has retired into *Dār-ul-Harb* seeking protection, then on being informed of sale he will have the right of pre-emption, and if he subsequently returns into *Dār-ul-Islām*, being aware of the sale, nevertheless he does not demand pre-emption, and again goes away, then his right of pre-emption will be annulled; but if he demands pre-emption, thereafter he undertakes a journey to *Dār-ul-Harb* or to any other place, then he will retain his right of pre-emption. If the pre-emptor is a *Harbī Mustāmin*, and he

مستامنا فوكل
بطلب الشفعة
ولحق بدار الحرب
فلا شفعة له كما
لو مات بعد
التوكيل بطلب
الشفعة وإن كان
الشفيع مسلما
أو ذميا فوكل
مستامنا من أهل
الحرب ثم دخل
الوكييل بدار الحرب
بطلب كالثد والشفيع
على شفعته لأن
لهاق الوكييل
دار الحرب كموته
وموت الوكييل
يبطل الوكالة
ولا يبطل شفعة
الموكل كذلك في
لحاته كذا في
الميسوط - و إذا
اشترى المسلم
دارا في دار
الحرب و شفيعها
مسلم ثم اسلم
أهل الدار فلا
شفعة للشفيع يجب
ان يعلم ان كل
حكم لا يفتقر الى
قضاء القاضي في دار
الاسلام و دار الحرب
في حق ذلك الحكم
على السواء وكل
حكم يفتقر الى قضاء

engages an agent to demand pre-emption, and he himself retires into *Dār-ul-Harb* then his right will be annulled in the same way as it would be if the pre-emptor were to die after appointing an agent. If the pre-emptor is a Muslim or a *Zimmī* and he appoints a *Harabī Mustamin* as his agent, and the agent retires into *Dār-ul-Harb*, then the agency is terminated, but the right of the pre-emptor still survives, because the retirement of the agent into *Dār-ul-Harb* is like his civil death, and the death of the agent puts an end to the agency and not to the right of pre-emption of the principal. This is according to the *Mabsūt*. If a Muslim purchases a house in *Dar-ul-Harb* and its pre-emptor is also a Muslim, and afterwards all the people of *Dār-ul-Harb* embrace Islam, even then the pre-emptor will have no right of pre-emption. It should be noted that all rights, which require no decree of the Kazi for perfection, accrue independently both in *Dār-ul-Harb* and in *Dār-ul-Islām*, but all rights which are perfected by the decree of the Kazi do not arise in favour of Muslims in *Dār-ul-Harb*. The examples of the former case are sale and purchase,

القاضي لا يثبت هذا
الحكم في حق
من كان من
المسلمين في دار
الحرب لمباشرة
سبب ذلك الحكم
في دار الحرب
نظير الاول حواز
البيع والشراء وصححة
الاستيلاء ، فنفاذ
العتق و وجوب
الصوم والصلوة
فإن هذه الأحكام
كلها من أحكام
الإسلام وتجري
علي من كان في
دار الحرب من
المسلمين و نظير
الثاني الزنا فان
المسلم اذا زنى
في دار الحرب ثم
صار هي دار الاسلام
لا يقام عليه الحد
كذا في المحيط -

institution of slavery, emancipation
prayers and fasting. All these equally
apply to all Muslims in *Dār-ul-Harb*, and an example of [the latter is
Zinā (illicit connection with a woman),
hence if a Muslim residing in *Dār-ul-Harb*
commits *Zinā*, thereafter that
Dār-ul-Harb becomes a *Dār-ul-Islām*,
then he would not be subject to *Hadd*¹
punishment. This is according to the
Muhibbīt.

¹ The prescribed punishment of 100 stripes under the Muslim Law.

الباب

السادس عشر

في الشفعة في المرض

١١٧ - و اذا اشتري

المريض دار بالفدي

درهم و قيمتها الف

درهم و له سوى

ذلك الف درهم

ثم مات فالبيع

جائز للشفيع فيها

الشفعة لانه اذما

habah بقدر الثالث

و صحي ذلك منه

في حق الاجنبي

فيجب للشفيع فيها

الشفعة و ان باعها

بالفدين و قيمتها

ثلاثة آلاف و شفيعها

اجنبي فله ان

يأخذها بالفدين

- كما في المبسوط -

باع المريض دارا

بالف و قيمتها

الفان ولا مال غيرها

يقال للمشتري ان

شئت خذ بثلثي

الفين والا فدع

CHAPTER XVI

OF PRE-EMPTION DURING SICKNESS.

117. If a patient purchases a house for two thousand *dirhams* whereas the actual value of the house is 1000 *dirhams*, and besides that he had with him one thousand *dirhams* more, thereafter he died, in this case the sale is deemed lawful, and the pre-emptor will be entitled to pre-empt it, because the patient may be deemed to effect a *mahābāt*,¹ concession purchase, and paid intentionally one-third of the price more, and this cannot affect the right of pre-emption. If a patient sells a house worth 3,000 *dirhams* for two thousand *dirhams*, and its pre-emptor is a stranger,² then he has the right to take the house for two thousand *dirhams*. This is according to the *Mabsūt*. A patient sells a house worth 2,000 *dirhams* for 1,000 *dirhams* and he has no other property except this, then the purchaser will be asked to take the house for two-thirds of 2,000 *dirhams* or give up the sale; and the

¹ A sale where the object is not to make gain, it is in the nature of a special concession, in this case it is a case of purchase at an increased price, but usually it is a case of sale at a reduced price. A Muslim is entitled to make bequests to the extent of $\frac{1}{3}$ of the net assets, hence it is presumed that he can suffer loss voluntarily to the extent of $\frac{1}{3}$ of his property.

² In the sense that he is not an heir.

والمشفيع ان يأخذها بالف وثلث الف كذا في محيط السرخسي واذا باعها بالفيين الى اجل وقيمتها ثلاثة آلاف درهم فالاجل باطل ولكن يتخير المشتري يبين ان يفسخ البيع او يودي الى الافيين حالة ليصل الى الورثة كمال حقوقهم واى ذلك فعل فللشفعي الشفعة يأخذها بالفي درهم حالة وان باعها بثلاثة الاف درهم الى ستة وقيمتها الفا درهم ثم مات اجمعوا على ان الاجل فيما زاد على الثالث باطل ولكن اختلفوا اذه يعتبر الاجل في الثالث باعتبار الثمن او بما عتبر القيمة قال ابو يوسف² بما عتبار الثمن فيعجل بشلي

pre-emptor is also entitled to take the house for 1,000 and one-third of 1,000.¹ This is according to the *Muhiṭ* of *Sarakhsī*. If a patient sells a house worth 3,000 for 2,000 on credit for a specified period, then the condition of credit is invalid, but the purchaser has an option to cancel the sale or pay 2,000 *dirhams*, so that the deceased's heirs may benefit, and irrespective of the fact whatever course the purchaser adopts, the pre-emptor will be entitled to take the house on immediate payment of 2,000 *dirhams*. If the patient sells a house worth 2,000 on a credit of one year, for 3,000, and then died, then all jurists (*Hanāfi*) agree that as regards one-third of the amount the payment may be deferred, but there is difference of opinion as to what is this one-third, i.e., whether it would be considered with respect to the value of the house or the amount agreed to be paid for it. *Imām Abu Yusuf* holds that it would be determined with respect to the amount agreed, that is, two-thirds of the sale consideration, i.e., 2,000 must be paid, immediately, and the remaining 1,000 may

¹ $\frac{2}{3}$ of 2000 = 1333 $\frac{1}{3}$; 1000 and $\frac{1}{3}$ of 1000 = 1000 + 333 $\frac{1}{3}$ = 1333 $\frac{1}{3}$. Though the value of the property is 2000 but only $\frac{2}{3}$ is demanded immediately, because $\frac{1}{3}$ can be remitted under the law in virtue of the rule that a Muslim can suffer loss voluntarily to the extent of $\frac{1}{3}$ of this property.

الثمن و ذلك الفا
درهم ان شاء
والالف الثالثة الى
اجله وقال محمد
باعتبار القيمة
فيجعل بثلثي القيمة
و ذلك الف و ثلث
مائة و ثلاثة و ثلاثون
و ثلث ان شاء
والباقي عليه الى
اجله كذا في
المحيط - المريض
اذا باع الدار
من وارثه بمثل
قيمتها و شفيعها
اجنبي لاشفعة له
لان بيع المريض
من وارثه في مرض
الموت عينا من
اعيانه فاسد عنده
الا اذا اجازت
الورثة وان كان
بمثل القيمة وعند هما
جائز فيجب ولو
باعها من اجنبى
والوارث شفيعها لا
شفعة للوارث عنده
ايضاً لاده يصير
كافه باعها من
وارثه ابتداً وعند هما
تجب الشفعة هذا
اذا باع بمثل

be paid on the expiration of the period of credit. But Imām Muḥammad is of opinion that this one-third will be reckoned with respect to the actual value of the house *i.e.*, he should pay $1333\frac{1}{3}$ ¹ immediately and the remaining *i.e.*, $1666\frac{2}{3}$ on the expiration of the period. This is according to the *Mūhit*. If the patient sells a house for a price equal to its full value to his heir, and if its pre-emptor is a stranger, then he will not be entitled to pre-empt it, because according to Imām Abu Ḥanifa such sale, by a patient in his death sickness, of his property to his heir, even if it is for its full value, is considered *fāsid* invalid, unless other heirs give their consent to it, but according to the two disciples it is valid, and hence the right of pre-emption will arise. If the patient sells the house to a stranger while the heir is its pre-emptor, then according to Imām Abu Ḥanifa there will be no pre-emption, because if pre-emption is allowed it will really mean a sale of house by the patient to the heir; whereas the two disciples hold the opposite view, and this view applies

¹ *i.e.*, $\frac{2}{3}$ of 2000 = $1333\frac{1}{3}$; and $1333\frac{1}{3} + 1666\frac{2}{3} = 3000$.

القيمة فاما اذا
باع وحابي فان باع
بالغين وقيمه ثلاثة
آلاف فان باع من
الوارث وشفيعها
اجنبي فلا شك انة
لا شفعة له عند
ابي حنيفة^ع وعند هما
البيع جائز ولكن
يدفع قدر المحاباة
فتحجب الشفعة هكذا

في البدائع -
و لا صلح ما
ذهب اليه ابو
حنيفه^ع كذا في
المبسوط -

١١١ - ولو باع
من اجنبى فكذلك
لا شفعة للوارث
عند ابى حنيفة^ع
لكن الشفيع يأخذها
بتلك الصفة
باتيك البالىه بصفة
متبدلاته مقدرا سواه
اجازت الورثة او لم
تجز لان الاحارة
محلىها العقد
الموقوف والشراء
وقع نافذا من
المشتري لان
المحاباة قدر الثالث
وهي نافذة في

only where the patient sold the house for a price equal to the full value of the house. If the house is sold for a reduced price, e.g., a house worth 3,000 is sold for 2,000, and if it is sold to an heir and the pre-emptor is a stranger, then evidently according to Imām Abu Hanifa he will not be entitled to its pre-emption, but the two disciples consider the sale as valid provided the reduction in the price is made up, and hence the right of pre-emption will arise. This is according to the *Badāyi'*. The correct view is that of Imām Abu Hanifa. This is according to the *Mabsūt*.

118. If a patient sell a house to a stranger at a reduced price, even then according to Imām Abu Ḥanifa the heirs will not be entitled to pre-empt it; but the pre-emptor will be entitled to pre-empt the house at an increased price, as if it were a fresh transaction. It is immaterial whether the heirs give their consent or not, because their consent is essential only in cases where it is necessary to give validity to the sale. In a *mahābāt* sale at a reduced price of some property, say of the value of

اللاغين فلغت في حق المشتري فتلغوا في حق الشفعة هكذا في البدائع - ولو كان أحد الشفيعين وارثاً أخذها الآخر ولو كان البيع في الصحة فأخذ الوارث بالشفعة ثم خط البيع في صرصة لم تتجز إلا باجارة باقي الورثة ولو كان الخط قبل أخذ الوارث فإن أخذ بطل الخط وإن ترك صاحب كذا في النثار خاذنة ناقلاً عن العتابية - مريضن باع ١٥ ماره بالغي درهم وقيمتها ثلاثة آلاف ولا مال له غيرها ثم مات وابنه شفيع الدار فلا شفعة للأبن فيها لانه باعها من ابنه بهذه الثمن لم يجز وذكر في كتاب الوصايا ان

3000 at 2,000 *dirhams*, only one-third reduction is permissible under the law, but since this reduction cannot be availed of by the vendee, so it is useless for the pre-emptor. This is according to the *Badāyi'*. If there are two pre-emptors and one of them is an heir, then the other pre-emptor is also entitled to pre-emption. If the patient sells his house in good health and the heir pre-empts it, later on the seller reduces the price in sickness, such reduction would be invalid, except in that case where the remaining heirs give their consent. But if this reduction is effected before the heir demands pre-emption, then if the heir pre-empts the reduction would be deemed to be invalid, but if he does not demand pre-emption, it would remain valid. This is according to the *Tātār Khāniya* as stated in the '*Itabiyah*'. A patient sells a house worth 3,000 *dirhams* for 2,000, and he has no other property except that house; thereafter he died and his son happens to be the pre-emptor of that house, then he would not be entitled to pre-empt it, because if the patient had sold the house for such a price to his son, the sale would have been unlawful. But it is reported in the

على قولهما له ان يأخذها بقيمتها ان شاء والا صح ما ذكر هنا فانه نص في الجامع على انه قولهم جميعا - كذا اخي المبسوط - لو كان له مال غيرها فاجازت الوارثة فله الشفعة اتفاقا كذا اخي شرح مجمع البكريين - وادا باع المريض دارا وحابي فهيا ثم بري من مرضه والشفيع وارثه فان لم يكن علم بالبيع حتى الان فله ان يأخذها بالشفعة لان المرض اذا تعقبه برم فهو بمثابة حالة الصحة وان كان قد علم بالبيع ولم يطلب الشفعة حتى يري من مرضه فلا شفعة له كذا اخي المبسوط -

Book of Wills that according to the view of the two disciples the son would be entitled to pre-empt it on payment of a price equal to its value, and this is the correct view, and it is expressly stated in the *Jāmi'*, that this view is adopted by all the jurists. This is according to the *Mabsūt*. If the patient has some other property besides that house, then according to all jurists with the consent of the heirs he would be entitled to pre-empt it. This is according to the *Sharh Majma'-ul-Bahrayn*. If a patient sells his house at reduced price *mahābāt* sale, and thereafter he recovers from sickness and his heir happens to be its pre-emptor, then if the heir has not yet been informed about the sale, he can pre-empt it; because the sickness from which a patient recovers is not considered as death illness, however if the heir knew of the sale and had not demanded pre-emption, until the patient recovered, then he will not be entitled to pre-emption. This is according to the *Mabsūt*.

الباب

السابع عشر

في المتفقات

١١٩ - ذكر محمد^ر في الجامع الكبير ان الشفيع اذا باع بعض داره التي يستحق بها الشفعة مشاعا غير مقسوم بعد بيع الدار المشفوعة لا تبطل به شفعته وكذلك ان باع بعضها مقسوما مما لا يلي جانب الدار المبيعة لا تبطل به شفعته وان باع بعضها مقسوما مما يلي المبيعة تبطل به شفعته دار ان طريقها واحدي الدارين بين رجلين والآخر في الرجل خاصة باع صاحب الخاصة داره فللاخرين الشفعة بالطريق فان اقتسموا الدار المشتركة فاصاب احدهما بعض الدار مع كل الطريق الذي كان لها واصاب الآخر بعض الدار بلا طريق وفتح الذي لا طريق له نصيبة

CHAPTER XVII.

OF MISCELLANEOUS CASES.

119. It is reported by Imām Muḥammad in the *Jāmaī ‘Kabīr* that if the pre-emptor sells an undivided portion of his house by reason of which he demands pre-emption in some property sold, then his right of pre-emption is not annulled. Similarly if he sells a partitioned part of the property not adjacent to the property sold, his right will remain intact. But if he sells the partitioned portion adjacent to the property sold his right will be extinguished. If there are two houses with a common passage, and one house has two co-owners, while the other house has one owner; now the latter house is sold, then both the two co-owners are entitled to pre-empt it on account of the right of common passage. But if they (the co-owners) divide their house in such a manner that one receives a portion of the house and the entire passage, while the other receives a portion of the house without the passage, and the person in whose share the passage has been allotted, opens a door in some public road, here again both of them are *Shafī-i-Jār* to the house sold. But as regards pre-

بابا الى الطريق
الاعظم وهم جميعا
جاران للدار التي
بيعت فالذي صار
الطريق له احق
بشفعتها فان سلم
هو الشفعة اخذه
الآخر بالجوار ولا
تبطل شفعة بسبب
هذه القسمة كذا
في المحيط - لو اخذ
الشفيع الارض
بالشفعة فيبني فيها
او غرس ثم استحققت
وكلف المستحق
الشفيع بالقلع فلعم
البناء والغرس رفع
الشفيع على المشتري
بالثمن ولا يرجع
بقيمته البناء والغرس
لا على البائع ان
كان اخذها منه
ولا على المشتري
ان اخذها منه
معناه لا يرجع بما
نقص بالقلع كذا
في التبيين -

١٢٠ - والشفعة
عندنا على عدد
الرؤس اذا كانت
دار بين ثلاثة
نفر لاحدهم نصفها
والآخر ثلثها والآخر
سدسها فباع صاحب

emption the person in whose share the common passage is assigned will be preferred; and if he should relinquish his right, then the other will be entitled to pre-empt it in the capacity of *Shafi'-i-Jār*. Thus the partition effected has not extinguished his right. This is according to the *Muhīt*. If a pre-emptor pre-empts a certain land and constructs a building on it, or plants trees therein, thereafter some person on proof of his ownership reclaims the land, and desires the pre-emptor to demolish the building or uproot the plants, in this case the pre-emptor will be entitled to take the price of the land from the purchaser, but he is not entitled to the value of the building or of the plants, no matter whether he took the land from the seller or the purchaser, and this means that he cannot claim damages suffered by destruction of the building or the plants. This is according to the *Tabyīn*.

120. Pre-emption according to our jurists is decreed equally among the claimants. When a mansion is owned by three persons, one of whom has a half share in it, the other a third, and the other a sixth, and the owner of the half having sold his share, it is demanded

النصف نصيحة
و طلب الآخرين
الشفعية قضى بالشخصين
المبيع بينهما نصفان
وان باع صاحب
السدس قضى بينهما
نصفان في الكل
ولو اسقط بعضهم
فهي للباقيين للكل
على عدوهم ولو
كان البعض غائبا
يقضي فيها بين
الكتسor على عدوهم
واذا قضى للحاضر
بالكل ثم حضر
آخر قضى له بالنصف
ولو حضر ثالث
قضى له بثالث ما في
يد كل واحد ولو
سلم الحاضر بعد
ما قضى له بالكل
لا يأخذ القادر
الا بالنصف كما
في الكافي -
رجل زعم انه
باع داره من
فلان بكذا ولم
يأخذ الثمن فقال

in pre-emption by the other two sharers, then pre-emption is to be decreed between them equally in halves, or if the owner of the one-sixth share should sell his share, it is similarly to be divided equally between the other two sharers. If some of the pre-emptors relinquish their right, then the entire property will be decreed equally among the rest of the pre-emptors. If some of the pre-emptors were absent, then the property will be decreed to the pre-emptors present. And if the whole property has been decreed to a present pre-emptor, and thereafter an absent pre-emptor appears, then he will also be entitled to half of the property pre-empted, and if a third absent pre-emptor appears, then he would also be entitled to one-third of the property. If a pre-emptor after decree is passed in his favour gives up his right of pre-emption, thereafter an absent pre-emptor appears, then he will be entitled to half the property only. This is according to the *Kāfi*.¹ If a person says, "I have sold my house to a certain person for so much price, and I have not received the price." But the purchaser says, "I have not purchased the

¹ But the surrender of the right of pre-emption by one of the pre-emptors before the decree will entitle others to claim the whole property.

فلان ما اشتريتهها
 منك كان للشفيع
 ان يأخذها بالشفعه
 هذا اذا اقر انه
 باع من فلان وفلان
 حاضر ينكر الشراء
 فاما اذا كان
 غائبا فلا خصومة
 للشفيع مع المشتري
 كذا في المحيط دار
 بجنبه دار رجل بيعد
 والجار يزعم ان
 رقبة الدار البيعة
 له ويختلف انه لو
 ادعى رقبتها تبطل
 شفعته وان ادعى
 الشفعة لا يمكنه
 دعوي الدار انه
 له مادا يصنع
 حتى لانه يطلب شفعته
 قالوا يقول هذه
 الدار داري اذا
 ادعى رقبتها فان
 وصلت اليها الا
 فاذا على شفعتي
 فيها لأن هذه
 الجملة كلام واحد
 فلم يتحقق السكت
 عن طلب الشفعة
 كذا في فتاوى

house from you," nevertheless the pre-emptor will be entitled to pre-empt that house, and such effect will follow wherever the seller admits that he had sold the house and the purchaser, who is present, denies its purchase. But if the purchaser were absent, the pre-emptor would have no cause of action against him. This is according to the *Muhīt*. If a house which is adjacent to that of *Shafī-i-Jār* is sold, and he (*Shafī-i-Jār*) doubts whether the house sold is his property, and is afraid that if he claims the house as his property, his right of pre-emption will be invalidated because the owner of the house cannot be its pre-emptor, and also that if he demands pre-emption, then he would be unable to claim ownership. What should he do in this case so that his right of pre-emption is not invalidated? The jurists hold that he should say, "This house is mine, and I am the claimant of the house as my property, if I succeed so much the better, otherwise, I demand pre-emption in it." As this is a complete and continuous expression no indifference (*sukūt*) as to the right of pre-emption can be inferred at all from the very nature of such a demand. This is according to the *Fatawā-i-*

قاضي خان - عن ابي يوسف² اذا دعاها
فقال بيته غيب ولكنني أخذها
بالشقة فهو اقرار
ان البائع مالك
فلا تقبل بيته بعد ذلك وعنه انه
تبطل الشقة بعد عوى الملك ولو ادعى
النصف وقال اقيم
البنية وأخذ المباقى
بالشركة جاز كذا
في التنازع خانية -

١٢١ - رجل له دار غصبه غاصب
فبيعه دار بجنبها
والغاصب والمشتري
جاحد ان الدار
والشقة ينافي
له ان يطلب
الشقة حتى اذا
اقام البينة على
الملك تبين ان
الشقة ثابتة فاذا
طلب خاصم

*Kazi Khān.*¹ It is reported from Abu Yusuf, that if the pre-emptor claims ownership of the property subject of pre-emption but says, "My witnesses are absent, so I rather pre-empt the house," then this amounts to the admission that the vendee is its owner; thereafter the evidence tendered will not be relied upon. It is reported from Abu Yusuf, that the claim of ownership *ipso facto* invalidates the right of pre-emption. But if the pre-emptor claims ownership of half of the house and says, "I shall adduce proof and shall pre-empt the other half by reason of partnership, then it is deemed lawful. This is according to the *Tātār Khāniyya*.

121. A person has a house which is wrongfully possessed by another person, *ghāṣib* usurper, thereafter an adjacent house is sold, and the *ghāṣib* as also the purchaser deny the ownership of the pre-emptor and his right of pre-emption respectively, nevertheless the pre-emptor should make the demands of pre-emption, so that later on when he establishes by proof the ownership of the house usurped, then his right of pre-emption would be deemed to have accrued. And when he files the

¹ In British India it is possible to make such an alternative claim vide 25 A. L. J. R, 48; and 36 All., 476.

الغاصب الي القاضي
ويخبر القاضي
على صورة الامر
فيعد ذلك ينظر
ان اقام البيينة
قضى له بالدار
وبالشفعة في الدار
الآخر لان الثابت
بالبينية كالثابت
معاذية وان لم
يقم بيضة حلفهما
جميعا فان حلفا
لا يقضي له باحدى
الدارين وان نكل
قضى له بالدارين
وان حلف الغاصب
ونكل المشتري
لا يقتضي بالدار
المخصوصة ويقضي
له بالشفعة وان
كان على العكس
فالحكم على العكس
لان النكول اقرار
واقرار كل مقر
حاجة في حقه خاصة
كذا في محيط
السريري -
١٢٢ - وادا اشتري
دار او لها شفيع
فيبيع دار بحسب
هذه الدار طالب
المشتري بالشفعة
و قضى له بها ثم

suit for pre-emption he should summon the *ghāṣib* before the *Kazi*, and if he succeeds in his case, then the ownership of the house usurped and pre-emption in the other house will be decreed, because the fact has been established by the evidence. However if the pre-emptor produces no proof, then the *Kazi* will ask the usurper and the purchaser to swear, and if they both swear, then he would not pass a decree against either of them in respect of the house, but if they both refuse to swear, then a decree would be passed in favour of the pre-emptor for ownership of one house and for pre-emption in the other. However if the *ghāṣib* swears, while the purchaser refuses to swear, then no decree will be passed against him (*ghāṣib*), but pre-emption will be decreed in the house sold and *vice versa*, because refusal to swear amounts to an admission and is binding on that person. This is according to the *Muhīt* of *Sarakhsī*.

122. If a house is sold which has a *Shafi'-i-Jār*, later on another adjacent house is sold, and the (new) purchaser demands pre-emption which is decreed in his favour, thereafter the *Shafi'-i-Jār* turns up, then pre-emption of the house sold first will be decreed in his favour, but

حضر الشفيع يقضي
له بالدار التي
بحجارة وبمضي
القضاء في الثانية
للمشتري ولو كان
الشفيع جاراً
للمدارين والمسئلة
بحالها يقضي له
 بكل الدار الأولى
والنصف في الثانية
كذا في البداع -
وردي عن أبي يوسف
فيمن اشتري نصف
دار ثم اشتري آخر
نصفها الآخر فخاصمه
المشتري الأول فقضى
له بالشفعية بالشركة
ثم خاصمه الجار
في الشفعتين فالجار
احق بالشراء الأول
ولا حق له في
الثاني تعلق قضاء
القاضي به وكذلك
لو اشتري نصفها
ثم اشتري نصفها
ولو كان المشتري
لنصف الثاني غير
المشتري للنصف
الأول قلم يخاصمه
غيبة حتى أخذ

the decree of pre-emption of the second house will hold good in favour of the purchaser. But if this pre-emptor were a *Shaf'i-i-Jār* of both the houses respectively in the same manner, then a decree for the whole of the house first sold, and half of the second house will be passed in his favour. This is according to the *Badā'i'*. It is reported from Abu Yusuf that if a person purchases first half of a certain house, and the other half is purchased by another person, thereafter the first purchaser demands pre-emption from the other purchaser, and the Kazi decrees pre-emption in his favour on account of his being a *Sharīk*, and later on a certain *Shaf'i-i-Jār* claims pre-emption in both transactions, then he will be entitled to pre-empt the first sale but not the second sale, because a decree of the Kazi has already been passed with respect to it. Similarly, if a purchaser first purchases one half of a house and subsequently the other half, the effect will be the same. But if the purchaser of the second half is a different person, and the first purchaser does not claim pre-emption from him, meanwhile a *Shaf'i-i-Jār* demands pre-emption in the first sale, then in this case the same

الجار النصف
الاول فالجار احق
بالنصف الثاني
كذا في المحيط -
الاصل ان الشفعة ادنا
تستتحقق بملك قائم
وقت الشراء لا
بملك مستحدث لأن
السبب هو التصال
الملكيين فيعتبر
قيامه وقت الشراء
وإذا أخذ يكون
بمنزلة الاستحقاق
فإن كان بقضاء
ثبت في حق
كافلة الناس وإن
كان برضاء ثبت
في حقهما خاصة
اشترى دارا بالآفدين
وتقاضاه فادعه
آخر و صالحه
المشتري على
خمسينات على انكار
فأخذ الشفيع من
المشتري بالبيع
الاول رد المدعى
ما تبقى على
المشتري لأن القاضي
لما قضى بالشفعة
فقد قضى يكون

Shafi'i-Jar will also be preferred as regards pre-emption of the second sale. This is according to the *Muhit*. The fact is that the right of pre-emption arises by reason of ownership of (adjacent) property at the time of sale, and not by reason of ownership which accrues afterwards, because the object of pre-emption is conjunction, the 'union of two ownerships,' hence its existence is essential at the time of sale, and the property pre-empted become one's own property. And if the property is pre-empted by a decree of the Kazi, it will hold good against the world, but if pre-empted by mutual agreement, it will be binding only upon the parties to the contract. A house is purchased for Rs. 2000, and on payment of money its possession is delivered to the purchaser, thereafter another person claims that house, and the purchaser denies the claim, but finally the case is compromised on payment of Rs. 500, later on a certain person pre-empts the house on first sale under the decree of Kazi, then the claimant should return to the purchaser the amount given to him, because since the decree of pre-emption has been passed by the Kazi, it has also been conclusively established by the same

الدار ملك للبائع
فتبيين انه لا خصومة
بينه وبين المدعي
وظهر ان المدعي
أخذ مالا لا بازاء
حقه ولا بازاء دفع
الخصومة فانتقض
الصلح ولو اخذ
الشقيق بغير قضاء
لا يرد لأن الاخذ
حصل بتراضيهما
وتراضيهما حاجة
في حقهما لا في
حق غيرهما فيجعل
كبيع جديد جرى
بينهما ظهر انه
لا خصومة بينهما
كذا في محيط

السريري -

decree, that the house had actually belonged to the seller, therefore it is evident that there was no cause of action for the claimant as against the purchaser, hence what the claimant received was not lawful, nor was it in course of litigation, consequently the compromise was void. But if the pre-emptor were to pre-empt the property by mutual agreement, then the claimant will not be bound to return the 'compromise-consideration,' because a mutual agreement is binding upon the parties, though it is not binding on other persons, and further the transaction is treated as a new sale between the parties to the agreement. This is according to the *Muhit* of *Sarakhsî*.

١٤٣ - ولو ان
رجلا ورث ارارا
فبيعت ٥ ار بكتبهما
فاخذها بالشفعة
ثم بيعت ٥ ار اخرى
بكتب الدار
الثانية ثم استحققت
الدار المورثة
وطلب المستحق
الشفعة فانه يأخذ

123. A person inherits some property, thereafter an adjacent house is sold. He thereupon pre-empts the adjacent house, later on another house adjoining the first house is sold. Meanwhile the property inherited has been taken away by some other person, on establishment of his right of ownership. This new owner now demands pre-emption, and is held

الثانية الدار
والوارث يكون
بالدار، احق
الثالثة هكذا ذكر
القدوري ولم يذكر
ما اذا لم يطلب
المستحق الشفعة
ذكر في المتنقى
ان الدار الثانية
تره على المقتضى
عليه بالشفعة يعني
الذى كان اشتراها
الثالثة تترك في
يدي الذى هي
في يديه كذا في
الظاهرية - رجل
اشتراك دار او قبضها
فاراً الشفيع
اخذه فالمشتري
يعتها عن فلان
وخرجت من يدي ثم
او دعنه لا يصدق
ولا يجعل خصما
للشفعى وان اقام
البنية على ذلك
لاتسمع بينة وكذلك
لو قال وعيتها لفلان
وقبضها ثم او
دعنه لا يقبل
قوله ولو اقام
على ذلك بينة
لاتسمع بينة فان
حضر المشتري في

to be entitled to pre-empt the first house, and similarly he will pre-empt the third house provided he has a preferable claim. This view is stated by Imām Qudūrī, but he does not state as to what would be the effect if this new owner does not demand pre-emption. But it is stated in the *Muntaqa*, that the first house would remain with its previous purchaser against whom the decree of pre-emption could be passed; and the other house would remain with the person who has its possession at the time. This is according to the *Zahiriyya*. A person after purchasing a house takes its possession, thereupon the pre-emptor demands pre-emption. However the vendee says, "I have sold it to such and such person and it is no longer my property, but it has again been entrusted to me," then his statement will not be accepted, and he will be made a party to the suit instituted by the pre-emptor, and even if he produces witnesses, such evidence will not be accepted. Similarly if he says, "I have made a gift of the house to such and such person who after taking its possession has entrusted it to me," then such a statement will not be accepted; and if he adduces proof to this

الفصل الاول
والموهوب له في
الفصل الثاني وكان
ذلك بعد قضاء
القاضي للشافع
وأقام البينة على
الشراء او على
الهبة لا تسمح
باليقنة و كان القضاء
بالشفعة تقضى على
الشراء والهبة لأن
صاحب اليد صار
متقاضياً عليه فكل
من ادعى تلقي
الملك من جهة
صاحب اليد صار
متقاضياً عليه دار
في بدءاً جلاً اشتراها
من فلان فقد
الثمن والدار
تعرف لفلان وادعى
فلان انه وهبها
للداعي واراه ان
يرجع في الهبة
فالقال قول فلان
فإن لم يقض القاضي
للواهب بالرجوع
حتى حضر شافع
الدار فهو احق
بالدار من الواهب
وان لم يحضر
الشافع قضى القاضي
بالرجوع للواهب
فإذا قضى له

effect the proof also will not be accepted. However, if in the first case the purchaser turns up and in the second case, the donee appears, after the Kazi had already decreed pre-emption in favour of the pre-emptor, then the evidence of the purchaser to establish purchase, or that of the donee to establish gift, will not be admissible, for the decree of pre-emption by the Kazi has really cancelled both these transactions of purchase and gift, because a decree passed against the person in possession of the house is also deemed to be a decree against any person claiming ownership through him. If a house is in possession of A, and he alleges that he purchased it from B; while B alleges that he made a gift of that house to A. If B wants to take back the house, then his words would be accepted, but if before the decree of Kazi in favour of the donor is passed, a certain pre-emptor turns up, then he will have a preferential right in the house as against the donor, but if no pre-emptor appears, then the Kazi will pass a decree in favour of the donor revoking his gift. And when such a decree has been passed, thereafter the pre-emptor turns up, then

بالرجوع ثم حضر الشفيع نقض المرجع وردت الدار على الشفيع ولو كان صاحب اليد ادعى انه اشتراها من فلان على ان فلان بالخيار ونقدة الشمن وادعى فلان الهبة والتسليم وحضر الشفيع اخذها بالشقة وبطل الخيار لأن صاحب الدار بما اقر بالهبة والتسليم الى صاحب اليد فقد اقر بتبؤت الملك له اسقط فيه الخيار وصاحب اليد مقر بالشراء فثبتت الشقة باقرار صاحب اليد بالشراء عند سقوط خيار صاحب الدار وفي الاصل اذا كانت الدار في يد البائع وقضى القاضي للشفيع بالشقة على البائع فطلب الشفيع من البائع الا قاله فا قاله البائع اقالة جائزة وتعود الدار الى ملك البائع ولا تعود الى ملك

the order of revocation of gift will be cancelled, and the house will be given to the pre-emptor. If A alleges, "I purchased this house from B subject to his option, and I have paid the price for it," while B alleges, "I have made a gift of the house and delivered possession thereof to A"; thereafter, if the pre-emptor turns up, then he will be entitled to pre-empt it, and the option will terminate, because when B admits that after he made a gift of the house he delivered the possession, his admission really amounts to admitting the ownership of the possessor; hence this admission makes B's option void and A has admitted his purchase, thus thereby the right of pre-emption is established in favour of the pre-emptor. It is stated in the *Kitāb-ul-Asl* that if the house pre-empted were in the possession of the seller, and the Kazi passed a decree of pre-emption against the seller, and thereupon the pre-emptor returns the house to the seller, such a return *Iqāla*, to the seller will be lawful, and the house will pass into the ownership of the seller, and not into that of the purchaser. And it will be considered so far as the purchaser is concerned, as a fresh purchase of the

المشتري ويجعل
في حق المشتري
كان البائع اشتري
الدار من الشفيع
وكذلك ان كانت
الدار في يد المشتري
و قضي القاضي بالدار
للشفيع قبل ان
يقبض الشفيع
الدار من المشتري
ان اقال مع البائع
صحت الاقالة
و صارت الدار ملكا
للبائع في قول
ابي حنيفة^ر كذا
في المحيط -

١٢٣ - اذا مات
الشفيع بعد ما قضى
القاضي له بالشفعة
قبل ان يقبض
الدار و قبل ان
ينقض الثمن كانت
الدار لورثة الشفيع
لان قضاء القاضي
بالشفعة بميراثه البيم
ولو مات الشفيع
بعد ما اشتري
الدار كانت الدار
ميراثا لورثة ولو
قضى القاضي بالشفعة
و طلب المشتري
من الشفيع ان
يرد الدار على
المشتري بزيادة في
الثمن والزيادة من

house by the seller from the pre-emptor. Similarly if the house pre-empted were in the possession of the purchaser, and the decree of pre-emption is passed, and the pre-emptor after pre-empting the house from the purchaser, but before taking its possession returns the house to the seller, such a return *Iqāla* is lawful, and according to Imām Abu Hanīfa the house will become the property of the seller. This is according to the *Muhīt*.

124. If the pre-emptor after the decree of the Kazi is passed in his favour, but before he takes possession of the house, and has paid the price, were to die, then the right of pre-emption will pass to his heirs, because the decree of pre-emption is like a sale; and since the pre-emptor had died after pre-empting the house, the house pre-empted will be considered to be the property of his heirs. If a Kazi has passed a decree of pre-emption, and the purchaser asks the pre-emptor to give him back the house on payment of a higher price, and the augmentation of the price is settled to be in kind or it is otherwise, and the pre-

جنس التمن او من غير جنسه تصير الدار للمشتري بالثنين الاول و تبطل الزيادة لأن دار الدار على المشتري بمنزلة الاقالة والاقالة انما تكون بالثنين الاول وكذا الو طالب المشتري من الشفيع بعد ما قضي القاضي بزيادة في التمن ففعل كانت اقالة والاقالة كما تكون بين البائع والمشتري تتحقق وبين البائع والشفيع كذا في فتاوى قاضي خان -

١٢٥ - و اذا مات الشفيع بعد البائع قبل ان يأخذ بالشفعه لم يكن لوارثه حق الاخذ بالشفعه عندها ولو كان بيع الدار بعد موته كان له فيها الشفعه كذا في المبسوط اذا مات البائع والمشتري والشفيع حي

emptor gives his consent, then the house will pass to the purchaser on payment of the original price, and the excess will be invalidated, because the return of the house to the purchaser is like *Iqāla* and *Iqāla* can take place only at the original price. Similarly if the Kazi decrees pre-emption in favour of the pre-emptor, thereupon the purchaser asks the pre-emptor to restore the house to the seller on payment of an extra amount, and the pre-emptor agrees, this would also amount to an *Iqāla*, and it will hold good equally in case of the seller and pre-emptor, as it does in the case of the purchaser and the pre-emptor. This is according to the *Fatawa-i-Kazi Khān*.

125. If the pre-emptor dies after the sale has taken place but before actually pre-empting the house,¹ then according to us (*Hanafi Law*), his heirs will not be entitled to pre-empt it. But if the sale were to occur after the pre-emptor's death, his heirs will be entitled to pre-empt it. This is according to the *Mabsūt*. If the seller and the purchaser were to die, but the pre-emptor is alive, then he is entitled to pre-emption. This

¹ Before the decree of the Court.

فلى الشفيع الشفعة
كذا في فتاوى قاضي
خان - و اذا مات
المشتري والشفيع
حي فلى الشفيع الشفعة
وان كان على
الميت دين لاتباع
الدار في دينه
واخذها الشفيع
بالشفعة وان تعلق
بالدار حق العزيم
والشفيع كذا في
المحيط - فان باعها
القاضي او الوصي
في دين الميت
فلى الشفيع ان يبطل
البيع و يأخذها
بالشفعة كما لو
باعها المشتري في
حياته وكذلك لو
او صى فيه بوصية
اخذها الشفيع
و بطلت الوصية كذا
في المبسوط - اثبت
الشفعة بطلبتيين
ومات فليس
للوارث اخذها
بالشفعة كذا في
السراجية - ولو كان

is according to the *Fatawa-i-Kazi Khān*. If the purchaser were to die but the pre-emptor is alive, then also he is entitled to pre-emption. Similarly if the deceased were in debt, then this house need not be put to sale for satisfaction of his debt, but the pre-emptor is allowed to pre-empt it notwithstanding the rights of the debtor. This is according to the *Muhīt*. If the Kazi or the executor of the deceased were to sell the house to discharge the debt of the deceased, nevertheless the pre-emptor will be entitled to exercise his right, and the sale will be invalidated ; similar will be the case if the purchaser himself had sold it in his lifetime. Similarly if the deceased left the house by will, the pre-emptor will enforce his right of pre-emption and the will will become void. This is according to the *Mabsūt*. A person, after making the first two demands of pre-emption,¹ dies, the right of pre-emption will not pass to his heirs. This is according to the *Sirājiyya*. If the pre-emptor becomes

¹ *Talab-i-Muwasabat* and *Talab-i-Ishhad*.

الشفيع قد ملكها
بتسلیم المشتري
اليه ثم مات
يكون ذلك میراثا
لورثته هكذا في
السراج الوهاج -
١٤٦ - اذا حط
البائع عن المشتري
بعض الشن سقط
ذلك عن الشفيع
وكذا اذا حط
بعد ما اخذ الشفيع
بالشأن يحط عن
الشفيع حتى يرجع
عليه بذلك القدر
وكذا اذا ابرأ
عن بعض الشن
او وبهه له فحكمه
حكم الحط ويأخذ
الشفيع بما بقي
واذا حط عنه
جميع الشن لم
يسقط عن الشفيع
وهذا اذا كان
حط الكل بكلمة
واحدة واما اذا
كان بكلمات يأخذها

the owner of the house after taking possession from the purchaser, and thereafter he dies, then the house will be inherited by his heirs. This is according to the *Sirāj-ul-Wahhāj*.

126. If the seller remits a portion of the price in favour of the purchaser, the price will also be remitted to that extent in favour of the pre-emptor. Similarly if the pre-emptor pre-empts the house on payment of the price, and thereafter the seller remits a portion of the price in favour of the purchaser, the price will be remitted to that extent in favour of the pre-emptor also, that is, the pre-emptor will be entitled to claim back the price so remitted by the seller in favour of the purchaser. Similarly if the seller releases the purchaser from paying a portion of the price or makes a gift of it to him, the same deduction will be made in favour of the pre-emptor as in the above cases. But if the seller remits the whole of the price to the purchaser, then the pre-emptor is not entitled to the whole remittance, this effect follows only if the whole price were remitted at the same time, for if it were remitted in parts,

بالأخيرة كذا في السراج وهاج - وادا زاد المشتري البائع في الثمن لم تلزم الزيادة الشفيع حتى انه يأخذها بالثمن الاول كذا في الجوهرة النيرة -
رجل اشتري دارا من رجل بالف درهم وتقابضما ثم زاده في الثمن الفا آخر من غير ان يتناقضا البيع ثم علم الشفيع باللافين ولم يعلم بالالف فأخذها الشفيع بالفين بحكم او بغير حكم فان اخذها بحكم ابطله القاضي ثم قضى له ان يأخذها بالشفعه بالالف لانه كان فضاء له بغير ما وجبت به الشفعه وان اخذها بغير حكم فهذا شراء مبتدأ فلا ينقض وفي جامع الفتاوى ولو اشتري دارا

then the pre-emptor will be entitled to pre-empt the house on payment of the last part of the price remitted. This is according to the *Sirāj-ul-Wahhāj*. If the purchaser increases the price in favour of the seller, then this excess will not be binding on the pre-emptor, who will be entitled to pre-empt it on payment of the original price. This is according to the *Jawhar-un-Nayyira*. A person purchases a house from another person for 1000 *dirhams*, and takes its possession and pays the amount, subsequently he increases the sale-consideration by 1000 *dirhams* for the seller without cancelling the sale, thereafter the pre-emptor is informed that the sale has taken place for 2000 *dirhams*, and being ignorant of the fact that the sale was originally for 1000 *dirhams* only, the pre-emptor pre-empted the house on payment of 2000 *dirhams*, whether by the decree of the *Kazi* or by mutual agreement. Now in the former case since the pre-emptor pre-empted the house by the decree of the Court, the *Kazi* will set aside the decree, and pass a fresh decree for 1000 *dirhams* only, because the first decree was passed on a misunderstanding, and hence it cannot be

فوهبهما لرجل ثم جاء الشفيع يأخذ الدار ويضع الشمن على يدي عدل عند أبي يوسف^٢ وعند محمد^٣ لا يأخذ حتى يحضر الواعب كذا في التناقر خانية -

binding, and in the latter case since the house was pre-empted under an agreement, it tantamounts to a fresh transaction, and therefore cannot be cancelled. It is stated in the *Jama'i Fatāwā* that if a person after purchasing a house makes a gift of it to another person, thereafter the pre-emptor appears, then according to Imām Abu Yusuf the pre-emptor is entitled to pre-empt that house and deposit its price with a trustworthy person. But, according to Imām Muḥammad, the pre-emptor cannot pre-empt the house, until the donor is brought before the Court. This is according to the *Tatār Khāniyya*.

١٢٧ - مكاتب مات عن وفاة ثم بيعت دار بجواره فلوى ورثته كتابته فلهم الشفعة لانه حكم بحربيته في آخر حياته فتثبتت جوارهم قبل البيع كذا في الكافي - رجل اشتري دارا ولها شفيع فقال الشفيع اجرت البيع وانا اخذ بالشفعه او قال

127. A certain slave *mukatib* dies leaving sufficient property to discharge *kitābut*, agreed compensation for emancipation, subsequently a house adjoining this property is sold. His heirs duly discharge *kitābut* so they are entitled to pre-empt the house sold. This is so, as the deceased was emancipated at his death, and the heirs were *Shafi-i-Jār* at the time of the sale of the house. This is according to the *Kāfi*. A person purchases a house which has a pre-emptor. The pre-emptor says, "I allowed the sale, and

رضيـت بالـبيـع وـاـذا
أـخـذ بالـشـفـعـة اوـقـال
سـلـمـت الـبـيـع وـاـذا
أـخـذ بالـشـفـعـة وـفـي
الـفـتاـوى اوـلـاـ حـقـ
لـي فـيـهـا فـهـوـ عـلـيـ
شـفـعـة اـذـا وـصـلـ
وـاـذا فـصـلـ وـسـكـتـ
ثـمـ قـالـ اـنـاـ أـخـذـ
بـالـشـفـعـة فـلـاـ شـفـعـةـ
لـهـ كـذـاـ فـيـ التـقاـرـ
خـانـيـةـ

- خـانـيـةـ

١٢٨ - عـنـ مـحـمـدـ
وـجـلـ اـشـتـرـىـ مـنـ
آخـرـ ١٥ـ اـرـاـ وـ جـاءـ
شـفـيـعـ الدـارـ وـادـعـىـ
اـنـهـ كـانـ اـشـتـرـىـ
هـذـهـ الدـارـ مـنـ
الـبـائـعـ قـبـلـ شـرـاءـ
هـذـاـ المـشـتـرـىـ فـاخـرـ
المـشـتـرـىـ بـذـلـكـ
وـ دـفـعـ اـدـارـ الـيـ
الـشـفـيـعـ ثـمـ قـدـمـ
شـفـيـعـ آخـرـ وـانـكـرـ
شـرـاءـ الشـفـيـعـ اـخـدـ
الـدـارـ كـلـهـ بـالـشـفـعـةـ
وـاـذاـ قـالـ المـشـتـرـىـ

now I shall pre-empt the house," or he says, "I consented to the sale and now I desire to pre-empt the house." Or he says, "I permitted the sale, and now I shall pre-empt the house"; and similarly according to the *Fatāwā* if the pre-emptor says, "I have no right in this house," then in all these cases he retains his right of pre-emption provided these statements were one and continuous and without pause, otherwise his right of pre-emption would be annulled. This is according to the *Tātār Khāniyya*.

128. It is reported from Imām Muhammad that a person purchases a house from another person, and the pre-emptor claims that he (pre-emptor) had previously purchased the same house from the seller before it was sold to the purchaser, now the purchaser corroborates this statement, and hands over the possession of the house to him; thereafter another pre-emptor appears, and he denies the purchase, by the first pre-emptor, then this new pre-emptor will be entitled to pre-empt the whole house.¹ If in the above example at the beginning the purchaser says to the pre-emptor

¹ Because the first pre-emptor appears to be conniving with the purchaser, and is thus deemed to have forfeited his right of pre-emption. It is also possible that the new pre-emptor has a superior claim.

للسفيع ابتداءً قد
كنت اشتريت هذه
الدار قبل شرائي
وهي لك بشرائك
وقال الشفيع ما
اشتريتها وانا أخذها
لشفعي فأخذها
الشفيع من المشتري
ثم قدم الشفيع
الآخر فليس له
الا نصفها كذا في
المخط - اشتري دارا
، قال اشتريتها الفلان
، اشهد ثم جاء
الشفيع فهو خصم
له الا ان يقيم
بينته ان فلانا
، كلها فحيث لا
يكون خصما ولو
قال العا قد ان
تباعينا بالف و رطل
من خمر و قال
الشفيع بل بالالف
فالقول للشفيع وفي
شرح الطحاوي
الوكيل بالشراء
اذا اشتري فحضر

"You had purchased the house before I purchased it and it is yours accordingly," and the pre-emptor says, "I had not purchased it, but I now per-empt it," and thereupon he took the house from the purchaser under pre-emption, and later on another pre-emptor appeared; this new pre-emptor will be entitled to pre-empt only half¹ of the house. This is according to the *Muhît*. A person purchases a house, and says, "I purchased it for another person" and tendered evidence on this point, thereafter the pre-emptor appears, then the purchaser should be made a party to the pre-emption suit; but if the purchaser had produced evidence to the effect that he acted simply as an agent for another person, then he need not be made a party to the suit. If the seller and the agent say, "We have mutually transacted the sale of this house for one thousand *dirhams* and one *ratt* of wine," and the pre-emptor denies it and says, "The sale actually took place for 1000," then the statement of the pre-

¹ It seems that both pre-emptors belong to the same class.

يأخذ الشفيع
السوكييل ويكتب العبردة عليه ولا يلتفت الى حضور الموكيل كذا في الظهيرية-اشترى دارا وبعد فوجد العبد اعور فرضية فالشفيع يأخذ الدار بقيمة صحيحاً وكذلك لورده بالعيوب لأن البيع حين وقع وقع بالعبد سليماً لا معيباً كذا في محيط السرخيسي -
رجل اشتري عقاراً بدراهم جزافاً واتفق المتبايعان على انهم لا يعلمون مقدار الدرهم وقد هلكت في يد البائع بعد التقاضي فالشفيع كيف يفعل قال القاضي الامام ابو بكر يأخذ الدار بالشفعه ثم يعطي الثمن علي

emptor will be relied upon. It is reported in *Sharḥ-i-Tahāvī* that if an agent purchases a house, thereafter the pre-emptor appears, then he would lawfully pre-empt the house from the agent, and the presence of the principal is not necessary. This is according to the *Zahiriyya*. A person exchanges a house for a slave, and then he found the slave to be one-eyed person, but he acquiesced in the transaction. Nevertheless the pre-emptor must pre-empt the house for the value of a sound slave. Similarly if the slave is returned on account of some defect found in him, the same principle will apply; because the transaction was effected with respect to a sound slave and not on the basis of a defective slave. This is according to the *Muḥīṭ* of *Sarakhsī*. A person purchases some property in lieu of some uncounted lots consisting of *dirhams*, and the seller and the purchaser did not ascertain the number of *dirhams*, and after mutual transfer of possession, these *dirhams* were lost by the seller. In such

زعمه الا اذا اثبت
المشتري الزيادة
عليه كذا في
الظهيرية -

a case how is the pre-emptor to act? Kazi Imām Abu Bakr observes that the pre-emptor should pre-empt the house by paying the price according to his own estimation of the value of the house, unless the purchaser proves that the price should be more than what the pre-emptor has estimated. This is according to the *Zahīriyya*.

١٢٩ - رجل له
ارض كثيرة المؤن
والخراج لا يشتريها
احد فباعها من
اسنان مع دار له
قيمتها الف بالف
و للدار شفيع
يأخذها بحصتها
من الثمن فيتقسم
الثمن على قيمة
الدار و قيمة الارض
ان اشترىها أصحاب
السلطان و ان كانت
لا يرغب فيها احد
يعتبر قيمتها آخر
وقت ذهب رغبات
الناس عنها لأن
القسمة تعتمد القيمية

129. A person has a plot of land which is heavily taxed because of rent taxes and revenue, *khirāj* and therefore no one cares to purchase it. The owner sells the land along with his house worth 1000 *dirhams* for 1000 *dirhams* only. Now if there is a pre-emptor of this house, he will be entitled to pre-empt the house for a price equal to its value. That is the whole price will be divided between the value of the house and that value of the land, which would be offered by the officers of the State, if they were to purchase it. And if no person is inclined to purchase the land, then its value will be that for which it was sold last, before it had ceased to attract purchasers, in short proportionate value should be estimated, and consideration money should

كذا في القنية -
و يمكن ان
يقال على قول
ابي حنيفة² يجعل
كل الالف بمقابلة
الدار اذا لم تكن
للسبيعة قيمة اصلا
كذا في المحيط -
و ذكر في
المنتقى عن ابى
يوسف² رجل في
يده دار عرف
القاضي انها له
فبيعت دار بجانب
هذه فقال الشفيع
بعد بيع الدار
التي فيها الشفعة
داري هذه لفلان
و قد بعثها منه
منذ سنة و قال
في وقت يقدر على
أخذ الشفعة لو
طلبتها لنفسه فلا
شفعة له ولا للمقر
له حتى يقيم
البنية على الشراء
لان الاقرار حجۃ
قصارة تصح في حق
المقر لا في حق
غيره كذا في

be divided proportionately after the ascertainment of the value of things. This is according to the *Quniyya*. However according to Imām Abu Hanīfa if the land is found to be of no value, then the price of the house will be 1000 *dirhams*. This is according to the *Muhīt*. It is reported from Imām Abu Yusuf in the *Muntaqa* that if a person is in possession of certain property, and the *Kazī* knows that it is his property, thereafter some property adjacent to it is sold, and subsequently this pre-emptor says, "This house of mine is really the property of such and such person to whom I sold it a year ago," since this admission was made by the pre-emptor at such a time, that he could pre-empt the adjacent property, if he had so desired, his right of pre-emption will thereby be extinguished, and the person in whose favour the admission is made is also not entitled to pre-empt the house, unless he adduces proof to the effect that he had previously purchased the house, because an admission is operative only against the person who makes it, and it confers no benefit on a third person. This is according to the *Muhīt* of *Sarakhsī*. It is stated in *Fatāwā-i-Itabīyya*, that if a person purchases some property

محيط السريري -
و في فتاري
العتابية ولو شرط
المشتري الخيار
للشفعي فقال اجرت
على ان لي الشفعة
جاز وان لم يقل
على ان لي الشفعة
بطلت وينبغي ان
يؤخر حتى يتحقق
البائع او تمضي
المدة كذا في
النثار خانية -
شفعي استولى
علي الارض من غير حكم
ان كان من اهل
الاستنباط وقد علم
ان بعض الناس قد
قال ذلك لا
يصير فاسقا وان
كان لا يعلم فهو
فاسق لانه ظالم
بخلاف الاول لانه
ليس بظالم كذا
في الفتاوي الكبرى -
١٣٠ - رجل ادعى
قبل رجل شفعة

subject to the option to be exercised by the pre-emptor, and the pre-emptor says, "I allowed the sale, on condition that the right of pre-emption accrues in my favour," then such statement is lawful. But if he did not mention the condition that the right of pre-emption should accrue in his favour, his right thereby will be extinguished. But the proper course for him is to cause delay, so that the seller himself will permit the sale, or the period fixed would expire. This is according to the *Tatār Khaniyya*. A pre-emptor took possession of a certain land without the decree of the *Kazi*; then if he is a *Ahl-i-Istimbat*,¹ and he was aware of the view expressed by some jurists then he will not be guilty, otherwise he will be guilty, because in the latter case, he will be considered to be a trespasser, but in the former case he cannot be deemed to be a trespasser. This is according to the *Fatāwā-i-Kubra*.

130. A person demands pre-emption against the purchaser by reason of his

¹ A person who understands the law.

بالجوار والمشتري
لا يرى الشفعة
بالجوار وانكر
الشفعة يحلف
بالله ما لهذا
قبلك شفعة على
قول من يرى
الشفعة بالجوار
رجل اشتري داراً
ولو يقبضها حتى
بيعها دار اخرى
بحبها فللمشتري
الشفعة رجل طلب
الشفعة في دار فقال
له المشتري دفعتها
اليك ان علم
الشفيع بالشمن
وفي هذا الوجه
التسليم صحيح
صارت الدار ملكاً
للشفيع واذا لم
يعلم الشفيع بالشمن
لا تصرير الدار
ملكها للشفيع وهو
على شفعته هكذا في
المحيط - جل ترك
داراً قيمتها الفان
، عليه دين الف
، و اوصى بثلث ماله
لرجل فراري القاضي

being *Shafi-i-Jār*, but the purchaser does not believe in *Shufa 'bil Jawār* and hence he objects. Now the purchaser will be asked to swear thus, "This pre-emptor has no right of pre-emption against me according to the jurists (Hanafi) who recognise *Shufa 'bil Jawār*." If a person purchases a house and before he takes possession of it, another house adjoining it is sold, then he will be entitled to pre-empt it. A person demands a house in pre-emption, and the purchaser says, "I have given the house to you in pre-emption," then if the pre-emptor is aware of the sale consideration, it will amount to a valid transfer, and the house will become his property ; but if the pre-emptor is not aware of the price, the house will not become his property, but he will retain his right of pre-emption. This is according to the *Muhīt*. A person died and he left behind a house worth 2000 *dirhams* mortgaged for 1000 *dirhams*. He also leaves a legacy of one-third of his property in favour of a certain person. The *Kazi* thinks that it is proper to sell the whole house, and if the heir and the legatee are its pre-emptors, then they both will be entitled to pre-empt the house. If the

بيع الدار كلها
والوايث والموصى
له شفيعان اخذاهما
بالشفعه ولو لم
يكن عليه دين
وكان في الورثة
صغرى فرأى القاضي
بيعها فليس للموصى
له ولا للورثة شفعة
ولا للصغرى ان كبر
وطلبها كذا في
الجامع الكبير -
سئل علي بن احمد عن
رجل اشتري او كانا
طلب الشفيع
الشفعة فسلمه اليه
المشتري الشفعة الا
انهما تنازعا في
الثمن فلم يأخذة
والى على ذلك
مدة ثم اراد ان
يأخذ بما قال
المشتري ليس له
ذلك الا ان يرضى
 بذلك المشتري وان
كان ثبت ان الثمن
على ما قال الشفيع
فله ذلك ولا تبطل
شفعته اذا صلح
ان الثمن على ما
قال الشفيع
كذا في النهاية
خانية - حل في
يديه ١٥ جلاء

deceased were not in debt, and one of his heirs were a minor, and the Kazi thinks it is proper to sell the whole house, then the legatee and all major heirs will not be entitled to pre-empt it; similarly the minor when he attains majority will not be entitled to pre-empt it. This is according to the *Jami-i-Kabir*. Ali Ibn Ahmad was consulted in a case, where a person purchased some property, and the pre-emptor demanded pre-emption in it, thereupon the purchaser agreed, but they differed as to its price, with the result that the pre-emptor did not pre-empt the property, and a long time elapsed. Subsequently if the pre-emptor desires to pre-empt the property on payment of the amount demanded by the purchaser, then he will not be entitled to do so unless the purchaser consents to it; but if it were proved that the real price was the same as the pre-emptor had offered, then his right of pre-emption will not be extinguished. This is according to the *Tatār Khāniyya*. A person is in possession of a house, and a person desires to pre-empt it, and he says, "You have purchased it from such and such person," and that person confirmed this statement, however the person in possession of

رجل وادعى شفعتها
و قال للذي في
يده هذه الدار
اشتريتها من فلان
وصدقه البائع في
ذلك و قال الذي
في يده الدار
ورثتها عن أبيه
واقام الشفيع البيينة
انها كانت لأبي
البائع مات و تركها
ميراثاً للبائع ولم
يقم البينة على
البيع فالقاضي
يقول للذي في
يديه ان شئت
فصدق الشفيع
وخذ منه الثمن
وتكون العبرة
عليك وان أبي
ذلك اخذ الشفيع
الدار و دفع الثمن
ويرد البائع الثمن
علي المشتري
والعبرة على البائع
و كذلك لو قال
الذي في يديه
وسمه ألي فلان و قال
الشفيع اشتريتها
من فلان وصدق
البائع المشتري
 فهو على ما وصفت
لكل ذلك في
المحيط -

١٣١ - دور مكة
لا يصح بيعها الا

F. 40

house says, "I have inherited the house from my father," whereas the pre-emptor adduces proof to the effect that the house belonged to the father of the seller who died, and left it to him in inheritance, but the pre-emptor did not adduce proof to establish the sale, then here the Kazi will ask the person in possession of the house to accept the statement of the pre-emptor, and pay the price, so that the responsibility of the contract will be on him; however if he refuses, the pre-emptor will pre-empt the house, and will pay the price to the seller, who will pay back this price to the purchaser, but the responsibility of the contract now will be upon the seller. Similarly if the person in possession of the house says, "Such and such person has made a gift of the house to me," while the pre-emptor says, "You have purchased it from such and such person" and the seller corroborates the latter statement, then in this case also the same law will be followed. This is according to the *Muhit*.

131. The sales of the houses of Mecca are not valid except of their structures,

بناؤها ولا شفعة
فيها وروى الحسن
عن أبي حنيفة[؟]
انه يجوز بيعها وفيها
الشفعة وبه قال
أبو يوسف[؟] وعليه
الفتوى كذا في
القنية في باب -
وقت ثبوت الشفعة -
وفي الفتاوى
العتابية ولو ببني
الشفيع ثم وجد بها
عيار جع بالقصان
ورجع المشتري
على باعها ايضا
ان كان الاول
بقضاء و كذا في
التاتار خانية -
وان كان المشتري
اشترى الدار على ان
البائع بري من
كل عيب بها
او كان بها عيب
علم المشتري بذلك
ورضي، كان للشفيع
ان لا يرضى بالعيوب
ويرد كذا في فتوى
قاضي خان -

so they are not subject to pre-emption,
but Ḥasan (Ibn Ziyad) has reported from
Imām Abu Ḥanifa that the sales of the
houses of Mecca are valid, and they are
subject to pre-emption, and the same
view is held by Imām Abu Yusuf, and
the *fatwa* accords with this view.
This is according to the *Qunīyya*. It
is mentioned in the *Fatāwā-i-Itābiyya*,
that if a pre-emptor constructs and
makes improvements in the house pre-
empted, thereafter discovers certain
defects in the house, then he will
be entitled to claim compensation
in lieu of such defects from the
purchaser, and the purchaser likewise
can claim the same amount from the
seller, provided he had delivered
the house under the decree of the *Kāzī*.
This is according to the *Tātār Khāniyya*.
If the purchaser buys a house on the
condition that the seller would not be
responsible for the defects, or the pur-
chaser is aware of these defects at the
time of sale, nevertheless the pre-emptor
would be entitled to return the house
because of the defects. This is according
to the *Fatāwā-i-Kāzī Khān*.

١٣٢ - وفي الاصل
 اشتري دارا وهو
 شفيعها ولها شفيع
 غائب و تصدق
 المشتري بيته منها
 و طريقه على رجل
 ثم باع سابقها منها
 ثم قدم الشفيع
 الغائب فرارا ان
 ينقض صدقة المشتري
 و بيعه فإذا باع
 سابقها من الدار
 من المتصدق عليه
 ليس له ان ينقض
 صدقته في كل
 الدار انما ينقض
 في النصف وإذا
 باع باقي الدار
 من رجل آخر كان
 للغائب ان ينقض
 تصدقه في الكل
 وفي الاصل ايضا
 تسليم الشفعة في
 البيع تسليم في
 الرهبة بشرط العرض

132. It is stated in the *Asl*, that a person purchases an enclosure, of which he himself was the pre-emptor, and there was another pre-emptor also, who was absent at the time of sale. Subsequently the purchaser gives away in *Sadaqah* charity an apartment of the enclosure along with the right of way, to a certain person, and also sells the rest of the enclosure. Thereafter the absent pre-emptor appears and desires to cancel the transaction of *Sadaqah* charity, and sale. Now if he finds that the purchaser had sold the remaining portion to the same person to whom he had given the apartment, then in this case he will not be entitled to cancel the entire *Sadaqah*, but he can do so as regards half of it, but if the seller had sold the rest of the enclosure to any other person, then the absent pre-emptor will be entitled to invalidate the entire *Sadaqah*. It is stated in the *Asl*, that the surrender of the right of pre-emption in the case of sale will be deemed to be a lawful surrender, if it turns out that the sale was really a gift with a condition of return, *Hibā-bi-shartil-iwaz*. Hence if the pre-emptor were informed that the house was sold, and thereupon he relinquished his

حتى ان الشفيع
اذا اخبر بالبيع
فسلم الشفعة ثم
تبين انه لم يكن
بيع و كان هبة
بشرط العوض فلا
شفعة له وكذلك
تسليم الشفعة في
الهبة بشرط العوض
تسليم في البيع
كذا في المحيط -
رجل اشتري دارا و
هو شفيعها بالجوار
فطلب جارا آخر
فيها الشفعة فسلم
المشتري الدار كلها
اليه كان نصف الدار
بالشفعة و النصف
بالشراء كذا في
الظاهيرية -

١٣٣ - اذَا باع
دارا على ان يكفل
فلان التمن وهو
شفيعها فكفل لا
شفعة له كذا في

right of pre-emption, later on, it was found out that it was not a sale, but a *Hibā-bi-shartil-iwaz*, then the pre-emptor will not be entitled to demand pre-emption. Similarly surrender of the right of pre-emption in *Hibā-bi-shartil-iwaz* will be deemed a lawful surrender of the right, if it were actually a case of sale. This is according to the *Muhibbīt*. A person purchases a house of which he is a pre-emptor in the capacity of *Shafi'i-Jār*. Thereafter another *Shafi'i-Jār* demands pre-emption, and the purchaser delivers to him the whole house, then half the house will be regarded as taken under pre-emption, and the other half as sold separately. This is according to the *Zahiriyya*.

133. If a house is sold on the condition, that such and such person, should be a surety for the price, although that person happens to be its pre-emptor, then if he accepts suretyship his right of pre-emption will be

القنية - و اذا وقع
 الصلح على دين
 على دار ثم تصادقا
 انه لا دين لا شفعة
 للشفيع ولو كان
 مكان الصلح بيع
 فللسفيع الشفعة
 كذا في التنازل
 خانية - رجل اشتري
 امة بالف وتقابضها
 و وجد بها عيبا
 ينقصها العشرة فاقر
 البائع او حجده
 فصالحة على دار
 جازو للشفيع اخذها
 بحصة العيب
 استحساناً لأن
 العيب الغائط مال
 ولهذا لو امتنع
 الرد يرجع بقيمة
 النقصان مع ان
 الاعتياض عن الحق
 لا يجوز ولو اشتري
 بحصة العيب شيئاً
 يجوز ثبت ان
 الدار ملكت بازاء
 المال وللمشتري ان
 يبيعها مرا بحصة على
 كل الثمن وليس

extinguished. This is according to the *Quniyya*. If a debt is compounded in lieu of a house, and thereafter both the parties (the creditor and debtor) admit that there was no debt at all then the pre-emptor is not entitled to pre-empt the house, but if the composition was in fact a sale transaction, then the right of pre-emption will arise. This is according to the *Tātār Khāniyya*. A person buys a female slave for 1000 *dirhams*, and he took possession of the slave and paid the price. Thereafter he found some defect in the female slave, on account of which the loss was estimated to be $\frac{1}{10}$ of the price, thereupon the seller gave a house by way of composition, and it is immaterial whether he admitted the defect or denied it, then according to the doctrine of *istehsān*, the pre-emptor will be entitled to pre-empt the house in lieu of the $\frac{1}{10}$ of the price, which was estimated as damages in lieu of the defect. However if the seller has not compromised in lieu of the defect, then the purchaser will be entitled to recover the loss from him, though it is deemed not proper to take compensation in lieu of a right, but if the purchaser takes a certain thing by way of compen-

لَهُ أَنْ يَبْيَعَ الدَّارَ
وَالآمِةَ مُرَابِحَةً
بِدُونِ الْبَيَانِ فَإِنْ
وَجَدَ الْمُشْتَرِي بِالْدَارِ
عَيْبًا فِيهَا بِقَضَاءِ
قَبْلِ اِنْ يَأْخُذَهَا
الشَّفِيعُ بَطْلَتْ شَفْعَتَهُ
دُعَادُ الْمُشْتَرِي عَلَىٰ
حَجْنَتَهُ فِي الْعَيْبِ
وَلَهُ أَنْ يَرَابِحَ
الآمِةَ عَلَىٰ كُلِّ الثَّمَنِ
مَالِمَ يَرْجِعُ بِالْعَيْبِ
إِشْتَرِي دَارًا وَصَالِحَ
مِنْ عَيْبِهَا عَلَىٰ
عَبْدِ اِخْذَهَا الشَّفِيعُ
بِحَصْنَتِهَا فَإِنْ فَعَلَ
فَاسْتَحْقَقَ الْعِيدُ
أَوْ رِدُّ بِالْخِيَارِ (رُؤْيَا)
أَوْ شَرْطُ فِي الصَّلَحِ
فِي الشَّفِيعِ بِالْخِيَارِ أَنْ
شَاءَ إِدَىٰ حَظَّ
الْعَيْبِ إِلَى الْمُشْتَرِي
وَإِنْ شَاءَ رِدَ الدَّارَ

sation for the defect, it would be valid. Thus it is clear that the house was given in lieu of something, therefore the purchaser is entitled to sell it *murabih* at profit, but he can only sell (*murabih*) the house and the slave at profit after pointing out the defect, but if the purchaser on discovering the defect returns it, before the pre-emptor has demanded pre-emption, then no right of pre-emption arises. Similarly as regards the slave girl, the purchaser has the right of return on account of the defect, and unless he has received compensation in lieu of the defect, he would be entitled to sell the slave *murabih* at profit in the ordinary course. A person purchases a house and discovering a defect compromised in lieu of it for a slave, then the pre-emptor will be entitled to pre-empt the house on payment of its proportionate price, and if he pays the whole sale consideration, he

¹ *Murabih* sale means a sale at a certain gain or profit, it is an incident of the sale that a seller may sell his property at any price, generally at some profit, but after having made up the loss (for the defect) by receiving compensation, it is expected that the seller should disclose the defect on a re-sale.

² It seems that in this case in spite of re-sale the purchaser would be entitled subsequently to recover compensation in lieu of the defect.

و يكون المشتري على الحجّة مع البائع ان اخذها بالقضاء لانه فسخ في حق الكل وكذا ان كان المشتري ره العبد بعيب بقضاء ولو ره برضاء لا شيء علي الشفيع كذا في الكافي -

will be entitled to take the slave also. And if the house was subject to option of inspection or was retained by reason of the compromise, then the pre-emptor would be entitled to compensation, or he may return the house to the purchaser, in the latter case the purchaser would be entitled to exercise all his rights against the seller, provided the house was taken under the decree of the Kazi, inasmuch as the Court had cancelled the rights of all, and the same would be the effect if the purchaser retains the slave on account of defect to the seller by a decree of the Kāzī, but if the return was made by mutual agreement, then there is no cause for the pre-emptor. This is according to the *Kāfi*.

١٣٢ - الاستحقاق
بحق سابق علي العقد يبطل العقد وبحق متاخر عنه لا يبطله و الشفيع كما يتقدم على من قام مقام المشتري اشتري دار بالف فزاد المشتري في الثمن او صالح عن دعوى فيها

134. It should be noted that rights which exist prior to the contract of sale can render the contract void, but those which arise subsequent to the contract cannot invalidate it at all, e.g., a person purchases a house for 1000 *dirhams*, and later on increases the price, or a certain person claims its ownership; and the purchaser after denying the claim compromises with him, subsequently the pre-emptor pre-empts the house under the decree

بانكار ثم اخذها
الشفيع بالف بقضاء
رجع المشتري على
المبائع بالزيادة وعلى
المدعى ببدل
الصلح لأن الشفيع
استحقها بحق
سابق على الصلح
او على الزيادة
فاوجب بطلان
الصلح و الزيادة
من الاصل ولو
سلم المشتري الدار
إلى الشفيع بغير
قضاء في الزيادة
يرجع على المبائع
وفي بدل الصلح
لا يرجع على المدعى
ولو كان المشتري
شفيعها ايضا
فتقضها المشتري
ووهبها لرجل
فلشربها اخذ
نصفها فإذا اخذ
تبطل الزيادة في
النصف الآخر كذا
في التنازع خانية -
رجل شهد بدار
لرجل فردت
شهادته ثم اشتراها

of the Kazi on payment of 1000 *dirhams*, then the purchaser will be entitled to reclaim the amount which he had increased, or what he had paid in lieu of the compromise from the person with whom he compounded, because the pre-emptor was legally entitled to pre-empt the house before the compromise or the augmentation of the price had taken place, in other words the pre-emptor's prior claim has rendered both the transactions, the augmentation of the price and the compromise invalid ; but if the purchaser gave the house to the pre-emptor by mutual agreement, then also he will be entitled to claim back the augmentation of the price from the seller, but he will not be entitled to claim back the consideration paid in lieu of compromise. If the purchaser happens to be the pre-emptor of the house, and he after taking possession of the house, made a gift of it to another person, then if there be also another pre-emptor he will be entitled to pre-empt half the house, and as the result of pre-empting the half, the gift of the other half will be rendered void. This is according to the *Tatār Khāniyya*. A person deposes that a certain house be-

الشاهد ولها شفيع
شفعيتها احق من
المقر له فان لم
يكن لها شفيع
ولكن المشتري
اشتراها لرجل امهة
بذلك فالدار
للامهون المقر له
فان اشتراها لنفسه
والشفيع خائب
فللمقر له ان يأخذ
الدار فاذا اشتري
الدار من المقر له
ثانيا قبل ان
يحضر الشفيع فهو
بالخيار ان شاء
اخذه بالشراء الاول
وان شاء اخذها
بالشراء الثاني ولو
اشتري الدار رجل
آخر من ذي اليد
ثم اشتري الشاهد
من ذلك الرجل
يلخير الشفيع فان
اخذها بالبيع الاول
بطل البيع الثاني
ورجع الشاهد
بالثمن على باعه
تصادق البائع
والمشتري ان البيع

longs to a certain person, but his deposition was rejected, thereafter the same witness purchases the house, and there is a pre-emptor of the house also, then the pre-emptor will be preferred as against the person in whose favour the deposition was made. If there is no pre-emptor, and the purchaser had purchased the house on behalf of his principal, then the latter will be entitled to the house and not the person in whose favour the deposition was made. And if the purchaser had purchased it for himself, and the pre-emptor was absent, then the person in whose favour the deposition was made will be entitled to take the house from the purchaser. If thereafter the purchaser buys the same house from the person in whose favour the deposition was made, later on the pre-emptor appears, then also he will be entitled to pre-empt the house either on the first or on the second sale. Thus if he pre-empts the first sale the second sale will be rendered void, and the witness vendee will take back his consideration money from his own vendor. If both the seller and purchaser unanimously admit that the sale was merely an agreement between them, or that there was an option in favour

كان تلبيته او كان فيه خيار البائع او المشتري وفسخها العقد لا يصدقان في حق الشفعة ولو الشفعة امر بشراء دار عين بعد عين للمامور ففعل صاحب الشراء للأمر ورجع المامور على آمر بقيمة العبد دار ان متصلتان لرجلين وكل كله واحدة من الدارين مشتركة بينهما فباع كل واحد منها حظه من هذه الدار بحظه صاحبة من الدار الأخرى فالشفعة لهما دون الجيران هكذا في الكافي - دار بيعت ولها ثلاثة شففاء احدهم حاضر وطلب الكل وأخذها ثم حضر احد الغائبين فله ان يأخذ نصف ما في يده فان صالحه علي الثالث

of either the seller or purchaser, and thereupon they cancelled the sale, then in determining the right of the pre-emptor, the words of the seller and the purchaser will not be accepted, and the pre-emptor will retain his right of pre-emption. A person asks another person (agent) to exchange a certain house in lieu of his slave (of the agent), and the person did so. Here the exchange is valid in favour of the principal, and the agent will be entitled to reclaim the value of the slave from the principal. There are two houses adjoining each other, and each house has two co-sharers, now each sharer exchanges his share in one house for that of the other co-sharer in the adjoining house, here pre-emption will be confined to them only, and the neighbours will not be entitled to it. This is according to the *Kāfi*. A house is purchased which has three pre-emptors, one of them who is present demands pre-emption and pre-empts the whole, thereafter one of the two pre-emptors who were absent appear, then he will be entitled to pre-empt the half of the same property, but if he desires he may compound his claim for one third.

فله ذلك و ان
حضر ذلك الثالث
أخذ من صاحب
الثالث ما في
يده فيضمه الى
ما في يد الآخر
فيقسمانه نصفين
فإن كان لهم شريك
رابع أخذ من
صاحب الثالث نصف
ما في يده فيقسمانه
إلى ما في يد الآخر
و قسمانه اثلاثا يكون

Thereafter if the third pre-emptor appears, he would take from the compounding pre-emptor one third of his share which will be added to the residue, and thereafter it will be divided between the two pre-emptors equally. If there were a fourth pre-emptor also, then half will be taken from the compounding pre-emptor taking one third, and would be added to the residue and then the whole will be divided thus the compounding pre-emptor will take 3 and the other three will take 15 shares, each getting 5.*

* Table of the shares of pre-emptors co-existing with a compounding pre-emptor.

First Pre-emptor	$\frac{3}{3}$	$\frac{7}{18}$	$\frac{5}{18}$
Compounding Pre-emptor	$\frac{1}{3}$	$\frac{2}{3} = \left\{ \frac{1}{3} - \left(\frac{1}{3} \text{ of } \frac{1}{3} \right) \right\} = \frac{4}{18}$	$\frac{1}{6} = \frac{1}{3} \text{ of } \frac{1}{2} = \frac{3}{18}$
Third ¹ Pre-emptor	...	$\frac{7}{18}$	$\frac{5}{18}$
Fourth ² Pre-emptor	$\frac{5}{18}$

¹ The compounding pre-emptor in the ordinary course would have taken one half, but he elected to take one third, now since there are three pre-emptors his legal share $\frac{1}{3}$ will be reduced further thus:

$$\frac{1}{2} : \frac{1}{3} : \frac{1}{3} : ? = \frac{2 \times 1}{3 \times 3} = \frac{2}{9}$$

² Now since there are four pre-emptors hence his legal share $\frac{1}{4}$ will be reduced further thus :

$$\frac{1}{3} : \frac{1}{4} : \frac{1}{3} : ? = \frac{2 \times 2}{4 \times 3} = \frac{1}{6}$$

لصاحب الثالث ثلث
فلهم خمسة عشر لكل
واحد خمسة ولو
ان الرابع ظفر
بمن اخذ الثالث
لا غير وقد قسمت
الدار على ثمانية
عشر اخذ نصف
ما في يده دار لها
ثلاثة شفعاء اشتري
اثنان منهم الدار
على ان لاحد هما
السدس والباقي
للآخر صلح الشراط
ولا شفعة لاحد هما
في نصيب الآخر
فإن حضر الثالث
قسمت الدار
على ثمانية عشر
لمشتري السدس
سهمان ولكل واحد
ثمانية و المائة
تخرج من تسعة ثمان
لقي الثالث صاحب
السدس ولم يلق
الآخر اخذ نصف
ما في يده لماعرف وان
لقيا الآخر قسمت
الدار بينهم على
ثمانية عشر على

If the fourth pre-emptor finds the compounding pre-emptor and does not find any other pre-emptor, since the house has already been divided into 18 shares, he can now only take one half of one-third that is one sixth. There are three pre-emptors of a house, and two of them purchase the house with a condition that one will take one sixth, while the other will take the remainder, such purchase will be valid, and one of them will not be entitled to pre-empt the share of the other. Thereafter if a third pre-emptor appears, the house now will be divided into 18 shares and 2 shares would be given to the pre-emptor who had consented to take one sixth as stipulated, while the remaining two pre-emptors will get equal shares, i.e., each getting 8 shares,¹ and the figure nine is the basis of the solution. If the third pre-emptor meets only the pre-emptor taking one sixth part, and does not find the second pre-emptor, he will be entitled to half of his share, i.e., one twelfth,² but if he also finds the second pre-emptor then the partition will take place in 18 shares as said above. This is according

¹ First pre-emptor $\frac{8}{18}$, third pre-emptor $\frac{8}{18}$, compounding pre-emptor $\frac{1}{2} - (\frac{1}{3} \text{ of } \frac{1}{6}) = \frac{2}{18}$.

² This is so because there are now only two pre-emptors and they must share equally, as others are absent.

مامركدا في محيط
السرخسي - باع نصف
داره، وأخذة الحجار
و قاسمه بقضاء
أو بغية و حضر
الشريك في الطريق
ياخذ ما في يده
ولا ينقض القسمة
بسخلاف ما لو
اشتري دار أو أخذ
الشفيغان، و اقتسم
ثم حضر الثالث
فإن حضر الشفيغ
الثالث ولم يلقي
الشفيعين بل لقي
أحدهما فإنه يأخذ
ربع ما في يده
لأنصفه قال المشتري
ل أحد الشفيعين
اشترت الدار لك
بامرك فصدقة
المقرله وكذبه الآخر
فالدار بينهم بالشفعة
وان قال المشتري الدار
ل لك ولم تكن لي
واشتريتها قبلني أو
و هبتك و قبضت
فصدقة المقر له

to the *Muhibb* of *Sarakhsī*. A person purchases half of a house, and a *shafi-i-jār* pre-empts it, and has it partitioned by the decree of the *Kazi* or by an agreement with the seller. Thereafter a pre-emptor who is a sharer in the way (*Shafi'-i-Khalīf*) appears, then he will be entitled to pre-empt the whole house from the *Shafi-i-jār*, but the partition effected will remain valid. If a house is purchased and there are two persons who pre-empted it, and mutually divided it. Thereafter a third pre-emptor appears, and if he were not able to find both the pre-emptors, but found one of them, then he will not be entitled to pre-empt half of the share but only $\frac{1}{4}$ from him.¹ A person says to one of the two pre-emptors, "I have purchased this house for you by your order," and one of the pre-emptors ratified it, while the other pre-emptor denied it, then nevertheless the house will belong to both of them jointly. If the purchaser says, "This house belongs to you; it never belonged to me," or "you had purchased it before me," or "I have made a gift of it to

¹ Because now as in the above two cases we are concerned with two pre-emptors only hence they must divide one-half property equally between themselves, i.e., take $\frac{1}{4}$ each.

وكذبه الآخر بطلت
شفعة و كانت الشفعة
كلها لآخر كذا
في الكاف -

١٣٥ - و اذا باع
المفاوض ٥ ماراً له
خاصة من ميراث
و شريكه شفيعها
بدار له خاصة من
ميراث فلا شفعة
له فيها كذا في
المبسوط - و تسلیم
احد المتفاوضين
شفعة صاحبة بسبب
٥ مار له خاصة ورثها
جاائز كذا في
محيط السرخيسي -

١٣٦ - ولو كان
المضارب هو الشفيع
بدار من الصاربة
فيها ربح و ليس

you, and you had taken possession of it," and one of the pre-emptors corroborates the statement, while the other pre-emptor denies it, here the former pre-emptor will forfeit his right of pre-emption, but the latter will be entitled to pre-empt the whole. This is according to the *Kāfi*.

135. If a *mufāwiz*¹ partner sells his own private house which he inherited, and if the other partner is its pre-emptor by reason of his own private property, nevertheless he will not be entitled to pre-empt the house. This is according to the *Mabsūt*. If one of two *mufāwiz* partners relinquishes the other's right of pre-emption, which accrued to him by reason of his own property, then in this case such surrender will be deemed to be valid. This is according to the *Muhib* of *Sarakhsī*.

136. If a *muzārib* partner² is the pre-emptor of some house by reason of some *muzārib* property and he has no other property except the *muzārib* property, and

¹ *Mufāwiz* are partners who have contributed equal sums in the partnership, and each is held absolutely responsible for the other's acts.

² *Muzārib* means a partner who applies his personal labour and *rabul mal* means a partner who supplies his capital in the partnership.

في يده من مال
المضاربة غيرها
فسلم المضارب
الشقة كان لرب
المال ان يأخذها
لنفسه وان سلم
بـ المال كان
للمضارب ان
يأخذها لنفسه كذا
في الميسوط - اشتري
المضارب ببعضها
دارا و اشتري رب
المال الى جنبها
دارا اخرى لنفسه
فللمضارب اخذها
بالشقة بما بقي
من مال المضاربة
كذا في محيط
الشخصي واذا اشتري
المضارب دارين
بـ مال المضاربة وهو
الف درهم يساوي
كل واحدة منها
الف درهم فيبعت
دار الى جنب
احديهما فلا شقة
للمضارب فيها
والشقة لرب المال
لان كل واحدة
منهما مشغولة فلا
يأخذها المضارب
بالشقة وهذا لان
الدور لا تقسم

now he surrenders his right of pre-emption, then the *rabul māl* partner will be entitled to preempt the whole house. If the *rabul māl* relinquishes his right of pre-emption, then the *muzārib* partner will be entitled to pre-empt it. This is according to the *Mabsūt*. If a *muzārib* partner purchases a house from its partnership's fund, and the *rabul māl* partner purchases another house adjoining the first house for himself, then the *muzārib* partner will be entitled to pre-empt the house purchased by *rabul māl*, out of the income of the *muzārib* property. This is according to the *Muhīt* of *Sarakhsī*. If a *muzārib* partner purchases two houses each of 1000 value out of the *muzārib* fund worth 1000 *dirhams*, thereafter a house adjoining one of them is sold, then the *muzārib* partner will not be entitled to pre-empt it, while *rabul māl* partner will be entitled to pre-empt it. Inasmuch as each of the houses are distinct and separate and the *muzārib* partner cannot pre-empt the house under pre-emption, and it is so because the houses cannot be considered as one unit for they are distinct and each stands separately. But if it were profitable, then

قسمة واحدة لها
فيها من التفاوت
في المنفعة فيعتبر
كل واحدة منها
علي الانفراد ولو
كان في احدهما
دبح كان له الشفعة
مع رب المال لانه
شريك فيها بحصة
من الربح كذا
في المبسوط -

١٣٧ - مضارب في
يده الفان من مال
المضاربة اشتري
باحدهما دارا ثم
اشتري بالآخر
دارا هو شقيقها
بدار المضاربة
وبدار له خاصة
ورب المال شقيقها
بدار له فلرب
المال ثلثها بالشفعة
وثلثها للمضارب
 الخاصة وثلثها على
المضاربة فان كان
هناك شقيق اخر
فله ثلث الدار

the *muzārib* partner along with *rabul māl* will be entitled to pre-empt proportionately to the share of profits. This is according to the *Mabsūt*.

137. A *muzārib* partner has 2000 *dirhams* in the partnership fund. He purchases a house for 1000 out of 2000, and thereafter he purchases another house for the remaining 1000 of which he were the pre-emptor by reason of a *muzārib* house as well as his own house, and the *rabul māl* partner also is its pre-emptor by reason of his own private house, then the *rabul māl* will be entitled to pre-empt $\frac{1}{3}$ of it, and the *muzārib* also will pre-empt $\frac{1}{3}$ and the remaining $\frac{1}{3}$ would be added to *muzārib* partnership property (as if pre-empted by it), i.e., the whole house under pre-emption will be divided equally among the *rabul māl*, *muzārib* and the partnership firm. And if there

وَ ثُلَثًا هَا بَيْنَ
الْمُضَارِبِ وَ رَبِّ
الْمَالِ وَ الْمُضَارِبَةِ
أَثْلَاثًا كَذَا فِي
مُحِيطِ السُّرْخَسِ -

١٣٨ - وَ فِي الْفَتاوِيِ
الْعَتَابِيَّةِ لَوْ طَلَبَ
الشَّفِيعُ الشَّفَعَةَ ثُمَّ
اقْرَأَ بِدَارَةِ الْجَلِيلِ
فَلِلْمُقْرَرِ لَهُ الشَّفَعَةُ
وَ كَذَا الْوَاحِدُ بِدَارَةِ
دَارِ ابِي عِتَادِ بِكَنْبِهَا
بِالشَّفَعَةِ ثُمَّ بَيَعْتَ
أُخْرَى بِكَنْبِهَا
الْمَاخْوَذَةِ فَأَخْذَهَا
ثُمَّ أُخْرَى بِكَنْبِهَا
بِقَضَاءِ فَاسْتَحْقَتْ
١٥٠، هـ الْأُولَى وَ
الْمَاخْوَذَةُ الْأُولَى
عَلَيِّ الْمُشْتَرِيِّ وَ بَقِيتُ
الْأُخْرَى لِلْأَخْذِ فَإِنْ
اسْتَحْقَتْ أَحَدِ
الْدَارَيْنِ بَطَلَتْ
الشَّفَعَةُ إِلَّا إِذَا
اجْزَأَ الْمُسْتَحْقِقَ
فَكَنْيَيْنِ لَمْ تَبْطُلْ
فَإِنْ كَانَ أَحَدُ
الْمُشْتَرِيَيْنِ شَفِيعًا
أَيْضًا فَلِلشَّفِيعِ

were another pre-emptor then he will be entitled to take $\frac{1}{3}$ and the rest $\frac{2}{3}$ of the property will be divided equally among the *rabul māl muzārib* and the partnership firm. This is according to the *Muhit* of *Sarakhsī*.

138. It is stated in the *Fatāwa-i-‘Itabiyya* that if the pre-emptor demands pre-emption, and thereafter admits the ownership of another person in the house by reason of which he demanded pre-emption, then the person in whose favour the admission is made will be entitled to pre-emption. Similarly if the pre-emptor pre-empted a house by reason of his house being adjoined to the house sold, then another house adjoining the house pre-empted is sold, and the pre-emptor pre-empted that house also, and thereafter he pre-empted a third house in the vicinity of the second pre-empted house by the decree of the *Kāzī*, and subsequently his first house was reclaimed by some person on establishment of his right of ownership, then he may have to return to the purchaser the first house which he had pre-empted, but the other houses will be retained by him, and finally if either of these houses were reclaimed by some person on proof of his title, then pre-

الآخر نصف الدار
بنصف قيمة الأخرى
كذا في التأثير
خانية - باع ١٥ ارا
من اجنبى فاحدة
الشقيق فمعرض
البائع وهو مورث
الشقيق وخط عن
المشتري بطل الخط
ولو ولاه المشتري
من وارث البائع
او رابح صاح
الخط ولم يلزمه
خط منه عن
الوارث كذا في
الكافى - ولا تقبل
شهادة الامر بالشراء
ولا شهادة ابنه
اذ كانت الدار
في يد البائع
ولو كانت في يد
المشتري جازت
شهادة ابن البائع
ولو شهد اثنان
على تسليم الشقيق
واثنان على تسليم
المشتري تهافتوا
ولو شهدوا الشقيق
بالشراء فان طلب
الشفعة بطلت

emption will be annulled, but if the claimant permits it will remain valid, and if either of the two purchasers happen to be pre-emptors also, then the other pre-emptor will be entitled to pre-empt half the house at half the value of the other house. This is according to the *Tatār Khāniyya*. A person sells a house to a stranger, and the pre-emptor demands pre-emption in it, thereafter the seller became ill, and he happens to be the person from whom the pre-emptor might inherit, and he remits a portion of the price to the purchaser (stranger), then such reduction will be invalid. If the purchaser (stranger) again sells the house to the seller at its cost price or at profit then it will be lawful and will thus effect the "heir pre-emptor" also. This is according to the *Kāfi*. The evidence of the person who authorises another person to purchase on his behalf, or the evidence of his sons would not be accepted even though the house were in the possession of the seller; but if the house were in the possession of the purchaser, the evidence of the sons of the seller will be accepted, and if two persons depose that

شهادته وان سلم
جازت ولو قال
اجزناه فطلب جاز
ولو اقر انه باعها
من فلان وانكر
المشتري ثبتت
الشفعه ولو كان
المشتري غائبا لم
يأخذ حتى يحضر
ولو اقر ولم يبين
المشتري فلا شفعة
كذا في الناقار
خاذية - واذا وكل
الذمي المسلم
بطلت الشفعة لم
تقبل شهادة اهل
الذمة على الوكيل
المسلم بتسليم
الشفعة لأنهم
يشهدون على
المسلم يقول منه
وهو منكر لذلك
وشهادة اهل الذمة
لا تكون حججة على
المسلم وان كان
الذمي هو الوكيل
وقد اجاز الشفيع
ما صنع الوكيل
قبلت شهادتهم
وبطلت الشفعة

the pre-emptor had relinquished his right of pre-emption or, the other two witnesses depose that the purchaser had transferred the house to the pre-emptor, then witnesses of both the parties will not be believed. If the pre-emptor produces evidence that the sale had taken place, and if he had already demanded pre-emption, the proof is useless, but if he had relinquished his right, the evidence tendered will be of use. If the pre-emptor says, "I have allowed purchase and also demanded pre-emption," the statement would be lawful. If a person admits that he sold the house to such and such person, but that person denies it, nevertheless the right of pre-emption will arise, but if the purchaser were absent, then the pre-emptor will not be entitled to pre-empt it, until he re-appears, and if the seller admits the sale but the purchaser has not named the purchaser then there will be no pre-emption. This is according to the *Tatār Khāniyya*. If a *Zimmī* appoints a Muslim as an agent to demand pre-emption, then if the *Zimmī* deposes to the effect that the agent has surrendered the right of pre-emption it will not be final.

لان الوكيل لو اقرب ذلك لجاز اقراره فان الوكل اجاز صنعة على العموم مطلقاً فكذلك اذا شهد بذلك عليه اهل الذمة لان شهادتهم على الذمي في اثبات كلامه حججة كذا في المبسو طولو قال البائع وعنة منه وقال المشتري اشتريته بكذا فالقول للبائع ورجع في الربة فان حضر الشفيع واخذها بالثمن فلا شيء له ولو اخذها بافارار المشتري ثم حضر البائع وانكر البيع اخذها كذا في التأثار خانية- المشتري المضارب دارا ورب المال شفيتها فسلم ثم باعها المضارب لا شفعة له لان المضارب باع له ولا شفعة لمن بيع له كذا في

against the Muslim agent, because the *Zimmī* here says that a relinquishment has been made by the agent, which the agent may deny, and the depositions of *Zimmīs* are not binding upon Muslims. But if the agent were also a *Zimmī*, and the pre-emptor had agreed that whatever the agent will do will be lawful, then the above deposition will be accepted, and the right of pre-emption will be annulled, because such act by the agent will be considered as lawful under the general authority of his principal. In short if the *Zimmī* deposes against a *Zimmī* agent, it will be accepted. This is according to the *Mabsūt*. If the seller says, "I have made a gift of the house to him," while the purchaser says, "I have purchased it for so much," the words of the seller will be accepted, and the seller will be entitled to revoke the gift; but if the pre-emptor appears and pre-empts it on payment of the price, then the seller will have no right to revoke the house. This is according to the *Tatār Khāniyya*. A *muzārib* partner purchases a house and the *rabul māl* partner is its pre-emptor, and he relinquishes his right of pre-emption, thereafter the *muzārib* partner sells it, now the *rabul māl*

محيط السرخسي -
و اذا قضي القاضي
للوكيل بالشفعه
فابي المشتري بان
يكتب له كتابا
كتب القاضي
بقضايئ كتاباً و اشهد
عليه الشهود كما انه
يقضى له بالشفعه
وان كان المشتري
ممتنا من التسليم
وال تقينا له
فكذلك يكتب له
حججه بقضايا و يشهد
علي ذلك نظرا له
و اذا كان له في
سائر الخصومات
يعطي القاضي
المقصي له سجلا
اذا التمس ذلك
ليكون حجة له
فكذلك في القضاء
بالشفعه يعطيه ذلك
كذا في المبسوط -
و في البتيمة
مسئل علي بن
احمد عن اشتري
نصيبا معلوما من
ارض مشتركة بين
جماعة بعضهم
حضور و بعضهم
غير اشتري نصيب
الغيب الحضور هل
لشفعه الجاران
ياخذ من المشتري

partner will not be entitled to pre-empt it, because the *muzārib* has sold it in a sense on his (*rabul māl*) behalf also, in the capacity of a co-partner, and he who sells a house cannot pre-empt it. This is according to the *Muhīt* of *Sarakhsī*. If the *Kazī* decrees pre-emption in favour of an agent, but the purchaser declines to execute the deed in his favour, then the *Kazī* will have the decree attested by two persons, just as he does when a purchaser refuses to deliver the house, and if necessary on application to him, as he does in all litigations with respect to all decree-holders, the *Kazī* will give to the pre-emptor a *sijl*, order, confirming pre-emption. This is according to the *Mabsūt*. It is stated in the *Yatimat*, that 'Ali Ibn Ahmad was consulted in case where a certain land was owned by some co-sharers, some of whom were absent, while others were present, and those who were present pre-empted the shares of those who were absent, here the point was whether *Shāfi'i-Jār* could pre-empt in the absence of the co-sharers. The answer was 'Yes,' but when the absent co-sharers will appear, they will be entitled to take back the property.

ما اشتري مع غيبة
الشريك فقال نعم
له ان يأخذ ذلك
وان حضر الشريك
كان احق به من
الجار كذا في
التقارير خارجية - ولو
وهي (جلان من)
رجل دار على الف
درهم و قبضا منه
الالف مقسومة بينهما
و سلما اليه الدار
ذلك وللشفيع فيها
الشقة لانعدام
الشيوع في الدار
فالتملك فيها واحد
وانعدام الشيوع
في الالف حين
قبض كل واحد
منهما نصيحة مقسوما
ولو كانت الالف
غير مقسومة لم
يجز في قول
ابي حنيفة^ن لأن
الشيوع فيما يحتمل
القسمة يمنع صحة
التعويض كما يمنع
صحة الهدية والالاف
يحتمل القسمة كذا
في المبسوط -

from the *Shafi'i-Jār*. This is according to the *Tatār Khāniyya*. If two persons made a gift of a house with a condition of return for 1000 *dirhams* to a person, and each received an equal amount out of 1000 from him, and they delivered possession of the house to the donee, the pre-emptor will retain his right of pre-emption, because the house was in joint ownership, and was not a divided one, and 1000 *dirhams* also cannot be said to be two different sale considerations, because what each gave was his share of the whole. If 1000 are not deemed divisible, then according to Imām Abu Ḥanifa, the transaction would be unlawful, because what is incapable of division cannot be subject of exchange and Hiba, and here 1000 *dirhams* are obviously capable of division. This is according to the *Mabsūt*.

SECTION II

PHILOSOPHY



JAMES WARD'S ANALYSIS OF EXPERIENCE

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Reader in Philosophy.

We have endeavoured, on another occasion, (*vide* Allahabad University Studies, Vol. VI, Arts Section) to clear up some of the misapprehensions which still exist about Kant's theory of knowledge. The essence of that theory, as we tried to establish then, is briefly this that thought as the principle of systematization necessarily enters into all knowledge, and this irrespective of the objects known. Whether the universe be in reality a "block universe," or a never-ending process of becoming, whether it be the creative march of event-particles or the continuous emergence of new qualities out of a space-time matrix, whether lastly it be only a stage for the mad dance of electrons or an unforeseeable spontaneous outburst of the élan vital, the mere fact that we are committed to give an intelligible description of the universe implies that thought constitutes its very essence and that there is no dualism between thought and reality. This of course does not mean that thought and reality are identical or that reality is only thought materialized. On the contrary, it has all along been our endeavour to distinguish between Reality and Thought, and if we say that there is no dualism between them all that we mean is that the existential reality must necessarily express itself through thought or that the universe is spread out on a rational

plan. This, we claim, was the upshot of Kant's theory of knowledge, though it is none of our purpose to justify that Kant was always consistent with this inevitable conclusion of his analysis of the knowledge situation.

It may now be easy, in the light of these considerations, to adjudge the merits of Maimon's criticism of Kant's reply to Hume, which, as we have remarked above, has more than a historical importance. Maimon's failure to appreciate the reply, which has been widely shared by contemporary thinkers, is due to the fatal assumption that Kant undertook the laborious investigation into the possibility of knowledge from the standpoint of psychology to show that Hume's derivation of the causal concept was essentially invalid and imperfect. So far as the psychological question is concerned, the real reply to Hume, we believe, has been given not by Kant but by the critics of presentationism and associationism. But the nature of the transcendental deduction will ever remain a closed chapter to us if we continue to regard it as a chapter in psychology. How we have, as a matter of history, come to the consciousness of the causal concept, as Kant warns his readers in the beginning of the famous deduction, is not to vindicate our right to the use of that concept in interpreting an object. Similarly when Maimon points out that the forms of knowledge can be discovered only by way of experience and from this argues that experience can guarantee neither the completeness nor the necessity of the categories, it may be respectfully retorted that Kant knew as much as his critic that "the analysis of the experiences in which they are met with is not deduction, but only an illustration of them, because from experience they could never derive the attribute of necessity."¹ The

¹ Kant's Critique of Pure Reason, 2nd edition, translated by Meiklejohn, p. 78.

question here is not one of empirical derivation. It is true that in presenting his arguments Kant does make use of expressions which have only a psychological import. But whatever justification there might be for Maimon to read into Kant's deduction a purely psychological meaning, there is no valid excuse for contemporary thinkers to ignore the value of Caird's remark that Kant's deduction is a process of argument which reconstitutes its own premises, and that Kant himself often refers to it " though perhaps he does not keep it so steadily before him as might be desired."²

Logic and Psychology.

If we then do not confuse the empirical with the transcendental deduction, it is necessary to avoid the mistake of the "celebrated Locke" and David Hume, and to realize clearly that the categories are, as Kant is never tired of insisting, "conceptions of an object in general." His reply to Hume does not consist in a mere criticism of Hume's psychology; but it consists essentially in showing that no psychological account of experience can lay claim to intelligibility which does not presuppose the necessity and universal validity of the categories, particularly of the categories of unity and causality. Even Hume, while ostensibly engaged in showing the derivation of the causal concept, had to present that derivation in terms of causality, and expected his readers to believe that the invariable perception *generates* in us habits and expectations. What is this notion of generation if it is not one of causation? It may be similarly shown that all the categories which Hume seeks to derive from a type of experience in which they are not already implicitly present there, and that Hume's apparent success is mainly

² *The Critical Philosophy*, I, p. 475.

due to the use of expressions which conceal from the reader the *hysteron proteron*. It is unnecessary to justify our conclusion in detail after the masterly criticism with which Green introduces Hume's readers into the Treatise of Human Nature. But in view of the current misinterpretations of Kant's theory of knowledge, it may be useful to remember that it was never Kant's contention that the categories are clearly recognized at all the levels of experience and by all of us at every moment of our life. On the contrary, it is only in moments of reflexion that they are realized to be present in our experience. Kant's principles of the pure understanding, as Caird sees it with his critical acumen, are not present "to the ordinary empirical consciousness, any more than the principles of Grammar are present to everyone who can give expression to his ideas in language. The kind of consciousness to which such principles are present in their abstract form, and in which they are deliberately used as guides in the scientific investigation of phenomena, is a result of reflexion."³

The elaborate details with which Hume's position has been developed in contemporary thought, and the new ramifications of Hume's theory of knowledge, as we have contended on another occasion⁴ are due to a serious oversight which prevents contemporary thinkers from realizing the exact nature of the transition from Hume to Kant. The essence of this transition, we are rightly told by Green, consists in showing that "the philosophy based on the abstraction of feeling, in regard to morals no less than to nature, was with Hume played out, and that the next step forward in speculation could only be an effort to re-think the process

Ibid., p. 479.

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of nature and human action from its true beginning in thought."⁵ Green therefore recommends the study of Kant and Hegel to every student of philosophy who will care to take the "step forward in speculation" and to leave behind the pre-Kantian "anachronistic systems." Our age, however, heedless of the warning, and perhaps inspired by the ideal of an infinite progress, is restlessly seeking to take another forward step beyond the philosophy based on thought which is generally condemned as barren intellectualism. Thus the intuitionist and the voluntarist, the romanticist and the pragmatist, in spite of their internal differences, have presented a united front against the intellectualist. If, however, Kant's reply to Hume be correct—and it is our firm belief that it is correct and final—then every theory of knowledge which begins with an initial repudiation of the competence of thought must represent a retrograde step in speculation. In analysing experience from different standpoints and thus bringing together the logical implicates of experience, Kant, we are strongly of opinion, laid down once for all the general scheme of every intelligible discourse. The scheme has no doubt been developed by his followers on lines that were not clearly realized by Kant himself. But the general outline remains the same, and all subsequent developments have been of the nature of filling up details. A philosopher can surely claim the right to think in a different way from another; but this claim for intellectual freedom cannot exempt him from restrictions which thought puts upon itself. These restrictions enter into the very essence of thought, and so every intelligible assertion must fall within the scheme.

These intellectual restrictions in the form of categories

⁵ Works, Vol. I, p. 371.

we have tried to work out from the implications of a judgment that claims to be true. It is unnecessary to supplement these general conclusions with a detailed criticism of the anti-intellectual theories of knowledge, as the work has been already done admirably by a number of thinkers of repute. Prof. Aliotta, for instance, concludes his masterly survey of contemporary philosophy with the remark that "if the true reality of things be complete in itself and perfect outside consciousness, the addition of consciousness and its subjective forms could only change and falsify it." But this is not true, because it is hopeless, it is rightly urged, "to endeavour to conceive of a *quid* anterior to thought and giving birth thereto, since such a *quid*, if regarded as real, in any sense, is already invested with the forms of thought, and is, so to speak, a fragment of thought projected into the past."⁶ Though, however, an exhaustive survey of the anti-intellectual theories is no more a desideratum, yet, it may be useful to emphasize the kernel of truth which has been well-nigh overshadowed by the modern zeal for new systems, and thus remove some of the misinterpretations of the function of thought that are largely responsible for the general distrust of reason. And for this, we must return once more to James Ward's analysis of experience, for, he was one of those great minds in whom the philosophical sciences of the end of the last century made a lasting impression, but were not able to clog their speculative insight. And if it can be shown that Ward, despite his rejection of atomism and presentationism, could not entirely free himself from the glamour of empiricism which led him into difficulties peculiar to presentationism, that circumstance by itself may be taken as a strong ground for the presumption that

⁶ Idealistic Reaction Against Science, p. 424.

the greatest thinker is bound to fall into confusions when he tries to trace knowledge to something beyond thought and self-consciousness.

James Ward's theory of experience, though not entirely original, has the unique merit of presenting the facts with that freshness of outlook and wealth of details which can come only from an intimate acquaintance with the different departments of knowledge combined with acuteness of thought, and desire for thoroughness. As an accomplished scholar, he never fails to inspire confidence even when his reader finds it difficult to follow him. Moreover, his analysis touches upon a number of very important problems which are still in the forefront of philosophical discussions of the day, and thus affords the reader an opportunity to concentrate on the main currents of contemporary thought without the trouble of an actual wading through the multifarious currents. We select here for consideration his contribution to the theory of knowledge and even with regard to this we shall restrict ourselves to some of the most outstanding features of that theory, particularly to those which offer a strong contrast with what is generally known as the idealistic analysis of experience. The importance of such an undertaking can hardly be exaggerated. For, despite the strong tincture of idealism with which Ward's position in general is imbued, there are very significant differences between his analysis and that of the idealists, and so one of them must ultimately be abandoned as false.

Experience, for Ward, is a term which includes "all that we know and feel and do, all our facts and theories, all our emotions and ideals and ends."⁷ The most persistent feature of experience in this sense is its duality

⁷ Naturalism and Agnosticism, II, p. 110.

as distinct from the dualism of matter and mind. The duality of subject and object characterizes experience at all the different stages through which it passes, and the most important point in the development of experience is reached with the dawn of self-consciousness. Epistemologists, according to Ward, have been almost always guilty of ignoring what psychological analysis has proved beyond the shadow of a doubt, namely, that there are "successive stages in the advance from the one level of experience or knowledge to the other."⁸ Much confusion has arisen from not recognizing that "both reflexion and reasoning are the result of social intercourse, the gradual development of which has produced this gulf between man and brute." Once it is assumed that "each man by himself is rational instead of recognizing that humanity has achieved rationality," the result is a fatal confusion of psychology with epistemology. "Our human perception, or intuition of things as expressed in language," it is urged in another connection, "is, of course, for us the nearest, the highest and the clearest." But, unfortunately, "epistemology has not merely started from the human level as it must: but it has tended to assume that this intellectual level is where knowledge itself begins."⁹ One of the fatal consequences of this confusion is to be found in the extremely loose way in which the terms 'subjective' and 'objective' are used in epistemological treatises. What is epistemologically subjective is erroneously regarded as psychologically subjective as well, and that which is psychologically objective is also supposed to be epistemologically objective. And thus arise all the difficulties of dualism and external perception.

⁸ Psychological Principles, 2nd edition, p. 32.

⁹ Mind, XXVIII, 1919, p. 268.

Psychology may avoid these confusions, Ward thinks, by clearly distinguishing between individual experience and universal experience. From its individualistic standpoint, it can show how experience at all the different levels of its development involves a relation between a knowing, feeling and active subject on the one hand, and an object on the other; and how universal experience "has grown out of, depends upon, and is really but an extension of, our primary, individual, concrete experience."¹⁰ This distinction between the concrete experience of a given individual and that experience which is the result of inter-subjective intercourse "systematized and formulated by means of abstract conceptions" is at the root of the dualism of commonsense and science. But dualism can effectively be refuted by showing that conceptual experience is preceded by a type of experience in which conceptions do not figure at all,¹¹ and that the trans-subjective object, far from being independent of the subjects that know it, is "rather what is common to" the objects of the separate individual knowers.

It is not necessary for our present purpose to reproduce all the arguments by which Ward seeks to establish his position outlined above, nor need we question the validity of his description of the different stages through which individual experience develops into something like an over-individual experience. The criticisms his theory has evoked in its psychological aspects—that is, as a true description of the development of individual experience as it is for the experiencing individual—are well known. But there are some very important epistemological issues involved in Ward's theory of experience, and if his

¹⁰ *Naturalism and Agnosticism*, II, p. 153.

¹¹ *Ibid.*, p. 155.

contentions be true, then it is time that we should revise our attitude to certain conclusions which have so far been accepted as indubitable verities in the field of epistemology. To these then we turn. And we can conveniently begin with the consideration of the individualistic standpoint which is thought to be the peculiar standpoint of psychology.

The Individualistic Standpoint leads to a Dilemma.

"Of all the facts with which he deals," it has been urged by Ward, "the psychologist may truly say that their *esse* is *percipi*, in so far as such facts are facts of presentation, are ideas in Locke's sense, or objects which imply a subject. . . . Psychology, then, never transcends the limits of the individual."¹² Hence Psychology may quite adequately be defined as the science of individual experience. But though in this sense, 'the whole choir of heaven and furniture of earth' may belong to psychology, yet psychology cannot ignore the difference between "the standpoint of a given experience and the standpoint of its exposition,"¹³ or, as Ward himself explains, it should not interpret the conduct of children as if they were already 'grown-up' persons.¹⁴ That is, the psychologist's business is to give a systematic account of experience as it grows from one stage to another in the life-history of an individual without confusing his own standpoint with that of the experient who actually owns the experience which passes through different stages of development. Now, the first question that naturally suggests itself here is: how is it possible for the psychologist to abandon his own standpoint and place himself in the position of a less

¹² Psychological Principles, p. 27.

¹³ *Ibid.*, p. 48.

¹⁴ *Ibid.*, p. 82.

developed mind in order to give a faithful representation of the world as it is presented to it? This question, it may be seen, is not trivial, and Ward has to raise it and offer an explanation. "The infant," he says, "who is delighted by a bright colour does not of course conceive himself as face to face with an object; but neither does he conceive the colour as a subjective affection." And the reason evidently is that conception or, as Ward elsewhere says, experience in which concepts figure is preceded by experience in which they do not. Yet, in dealing with the infant's experience the psychologist "is bound to describe his state of mind truthfully," and this according to Ward can be very well done without "abandoning terms which have no counterpart in his consciousness," because "these terms are only used to depict that consciousness to us." This explanation, however, does not seem to remove the difficulty. If the psychologist has to give a faithful description of the child's mind when it is face to face with the bright colour, he must not introduce into his description such terms as have a meaning *only for* those who have reached a higher stage of development. Because, in that case, the description is not of the child's mind whatever else it might be. The psychologist therefore seems to be between the horns of a dilemma. He must either stick to his own standpoint or abandon it. In the former case, he commits the 'psychologist's fallacy'; while in the other case, he may be faithful to the facts but he does it at the expense of intelligibility.

Unintelligibility of Experience Prior to Self-Consciousness.

Ward appears very often to prefer the latter alternative and insists on the essential unintelligibility of the lower forms of experience. Thus to take one clear instance, the lizard's immediate experience of sunshine and warm

stone occurring together, it is said, does not strictly admit of statement; yet, universal experience is "only an elaboration, though a most important elaboration," of the perceptual experience of the lizard.¹⁵ This impossibility of stating clearly the lizard's experience as it is for the lizard, it may be replied, is due to the absence of those distinctions in perceptual experience which exist only at a higher stage. But this admission, taken strictly, is not compatible with Ward's conception of development, as an epigenesis. We shall illustrate our point by reference to an interpretation of Ward's position given by Prof. Dawes Hicks in another connection. In explaining Ward's theory of the pure ego, and defending Ward's position against the suspicion that he was reviving the spiritualistic theory of a soul-substance, Prof. Dawes Hicks says that "wherever we have a state or mode of consciousness, there we have what may otherwise be called, using Lotze's terminology, a mode of 'being for self,' a mode of self-expression on the part of a subject that in and through such act is in some measure and to some degree aware of, or experiencing, itself. The awareness in question may be confused and indefinite to any extent, it may be no more than the first dim obscure stirrings of feeling; but the point is it is always there, and were it not the gradual development of self-consciousness would be inexplicable."¹⁶ This interpretation, we believe, may fairly be taken as a criticism of Ward's own position. If there is anything that Ward is most anxious to defend, it is this that self-consciousness is the latest stage in the development of experience, and that this development is an epigenesis. On the other hand, Prof. Dawes Hicks seeks to read into

¹⁵ Agnosticism and Naturalism, p. 184.

¹⁶ Mind, XXX, 1921, p. 5.

Ward's theory a conception of development which essentially consists in a process from the implicit to the explicit, from the potential to the actual. But to say that what is logically implicated is unconsciously involved in the former stage is, according to Ward, "bad psychology and assumes a scientifically unwarranted and unworkable use of the notion of potentiality,"¹⁷ and so development must lead to the emergence of new factors that did not exist in the prior stage.

Can there be a History of Self-Consciousness?

The point we have raised is too important to be ignored completely or treated lightly. Once it is made clear that it is only from the standpoint of the psychologist that the individual experience is intelligible, the hard and fast line by which Ward seeks to distinguish sense-knowledge and thought-knowledge, or experience in which concepts figure and that in which they do not, disappears; and we are landed in some such theory as that which Green, for example, expounded when he said that "a natural history of self-consciousness, and of the conceptions by which it makes the world its own, is impossible."¹⁸

It is however well known that Ward's account of the relation of the trans-subjective stage to the previous stage of individual experience has been thought to be unsatisfactory even by such a sympathetic critic as Mr. G. F. Stout. "If thought first arises," it is said, "after previous stages which can be accounted for without it, it emerges as a radically new faculty: there is a breach of continuity. But if we examine critically

¹⁷ Mind, XXVIII, p. 263.

¹⁸ Works, I, p. 166.

Ward's treatment of the development of the individual percipient prior to the beginning of the trans-subjective stage, we find that it already involves in manifold ways thought as well as sense."¹⁹ Now, we do not desire to consider the purely psychological question here. Whether, as a matter of historical fact, a given individual below the trans-subjective level has in its experience, in however crude a form, both sense and thought, it is for the psychologist to ascertain. Nor do we propose to consider the value of the psychological question for epistemology. But supposing that there is an experience which forms the subject-matter of investigation, then the question we raise is whether it is possible for the psychologist to give up his own standpoint, even when the experiencing subject whose experience he investigates stands at a lower level of development. Let us clear up the problem by means of an example. A psychologist, say, is required to give faithful description of a flower as it is for an experient below the trans-subjective stage. The psychologist being already at the trans-subjective level, knows the flower to be a unitary existence as distinct from other similarly existing things of the world with some of which it is related spatially, temporally and causally. And his knowledge of the flower is more or less adequate accordingly as he is a physiologist or a botanist. On the other hand, the experient whose experience he describes knows nothing of all these relations through which the psychologist knows it. Being at the sub-reflective level the psychological subject cannot evidently have that type of knowledge of the flower which implies identification and differentiation, causal connection and spatio-temporal relations. The question then is if it is possible for the psychologist to

¹⁹ The Monist, XXXVI, 1926, p. 41.

describe the flower as it is for the psychological individual. To do so, the psychologist must be able to strip the flower of all those relations through which he knows it, and thus reduce it to something which is, in the Kantian phrase, as good as nothing for him. But if he is not to commit the "psychologist's fallacy" he must describe the flower without introducing into his description any of the relations through which alone he knows it.

In the light of these considerations, we can easily realize the appalling responsibility that is thrown on the shoulder of the psychologist, when he is constantly warned against the psychologist's fallacy, and yet asked to do the miracle of describing individual experience from the standpoint of the experiencing individual. Ward, as we have seen above, avoids this perplexity, nay, evident absurdity, by saying that when in a psychological description the term sensation, for instance, is used it is simply meant to describe *to us* the individual's state of mind. But a disciple of Kant might similarly urge that the category of causality, though not applicable to the 'thing-in-itself,' is used in order to describe it to us. But any one would hardly accept the reality of the thing-in-itself on the ground on which Ward asks his reader to believe in a pre-intellectual or anoetic stage of mental development. Let us then turn to the description which Ward as a psychologist offers of individual experience below the trans-subjective level.

"Psychologists, it is said, have usually represented mental advance as consisting fundamentally in the combination and recombination of various elementary units, the so-called sensations and primitive movements: in other words, as consisting in a species of 'mental chemistry.' If needful, we might find in biology far better analogies to the progressive differentiation of experience than in the

physical upbuilding of molecules."²⁰ Even in higher minds, a presentation is still part of a larger whole, and " working backwards from this, as we find it now, we are led alike by particular facts and general considerations to the conception of a *totum objectivum* or objective continuum which is gradually differentiated." In many places, however, in our account of this process of differentiation, it is further said, the " only evidence apparently to which we can safely appeal in this enquiry is that furnished by biology."²¹ And the reason apparently is that the processes in many cases " have now proceeded so far that at the level of human consciousness we find it hard to form any tolerably clear conception "²² of the lower forms of experience. But in spite of these difficulties, it is believed that we can conceive individual experience which involves the duality of subject and object : the subject confronted with a partially differentiated sensori-motor continuum. But here we are on the other horn of the dilemma, and the problem is : how can we describe such an experience from the standpoint of the experiencing individual ? From the standpoint of the psychologist who stands at the intellectual level, it is of course possible, on the analogy of biological development, to conceive, though under difficulty, what the psychological individual might be. But that does not explain what its experience is *for* itself. The experient, for example, cannot know the objective continuum *as such*, because that would involve all those fundamental relations which, according to Ward, are much later attainments.

The only plausible answer to the question we have raised is perhaps to be found in the distinction, which

²⁰ Psychological Principles, p. 76.

²¹ *Ibid.*, p. 108.

²² *Ibid.*, p. 79.

Ward insists on in different contexts, between sense-knowledge and thought-knowledge. Thus, for instance, in opposition to Green's dictum that a consistent sensationalism must be speechless, Ward urges that "though sense is speechless, it is not 'senseless.'"²³ That is, if we understand Ward aright, epistemologists have been led to deny the non-intellectual type of knowledge on account of their pre-occupation with man at the intellectual level. But though it is true that "our human perception, or intuition of things as expressed in language is, of course, for us the nearest, the highest and the clearest" yet, it is not equally true that knowledge begins only at the intellectual level. In this respect, "formal logic and sensationalist psychology have been but blind leaders of the blind. Language, which has enabled thought to advance to the level at which reflexion about thought can begin, is now an obstacle in the way of a thorough analysis of it."²⁴ But anoetic consciousness, whether or no it actually exists, "is a conceivable limit, and has the theoretical usefulness of limiting conceptions generally."²⁵ Considered in this light, the experient at the sub-intellectual level has, it will be maintained, sense-knowledge of the sensori-motor continuum, and though it cannot translate its knowledge into the thought-form, yet that does not detract from the concreteness and immediacy of its non-intellectual knowledge. Far from being 'nothing,' individual experience is the primary, concrete experience, and even when the intellectual level has been attained it is this concrete experience which provides the necessary content, the *fundamenta*, for the relating activity of the intellect. Taken by itself, this content does not give rational

²³ Mind, XXVIII, p. 259.

²⁴ Psychological Principles, p. 313.

²⁵ *Ibid.*, p. 317.

knowledge, and cannot explain rational experience. But "without this content the universal and necessary factors" that enter into rational experience "lapse into empty form, become as incapable of yielding experience as empty dies of minting coin."²⁶

The answer outlined above, though not explicitly formulated by Ward, is strongly suggested by the uncompromising rigour with which he pursues the distinction between sense-knowledge and rational knowledge. We do not intend to repeat here the contentions we elaborated elsewhere about the distinction in question; but assuming the essential validity of the distinction in our experience, we ask whether on the basis of a distinction in self-conscious experience, it is possible to describe the experience of an individual below the level of self-consciousness—an individual that is *ex hypothesi* precluded from any knowledge that implies the power to distinguish. Such an individual, restricted to the enjoyment of its immediate experience, would know nothing of the distinctions that we make between subject and object, cognition and conation, thought and feeling. Its experience *for itself* would be, to borrow Ward's phrase, a matter of being rather than of knowing. And if such beings exist at all, in what sense can we describe its experience as involving the duality of subject and object which has been accepted as the universal feature of experience? It is of course not denied that an individual may feel without knowing that it feels; there is the whole difference here between consciousness and self-consciousness. Similarly, it is not denied that the subject-object relation may be involved in an experience, though the experient knows nothing of that relation; but, then, in describing such an experience the psychologist is not

²⁶ Naturalism and Agnosticism, II, p. 184.

describing it as it is *for* the experient, and thus committing the fallacy against which he is repeatedly asked to guard himself.

Epigenesis of Self-Consciousness is Virtually Denied by Ward.

The essential correctness of our contentions is implied in the explanation which Prof. Stout offers of the psychologist's fallacy. Though the psychologist is required "to give a coherent and truthful account of 'the development of individual experience as it is for the experiencing individual,'" yet, it is admitted, "there is an essential difference between this experience itself and what the psychologist knows and seeks to know about it. His standpoint and outlook cannot be identical with those of the individual he is studying. Otherwise, in order to study a baby's mind he must himself become a baby and so cease to be a psychologist. No data, conceptions, distinctions, hypotheses are illegitimate in psychology, if and so far as they help relevantly to answer properly psychological questions."²⁷ Similarly, Ward seems to suggest, in some places of his psychological account of experience, that the psychologist may give a truthful account of immediate experience even when he describes it only from his own standpoint. Thus, for instance, he admits a plurality of properties in a sensation while denying its complexity, on the ground that the psychologist can reflectively make an analysis and find out a plurality of constituents in an experience though such an analysis is not possible for the subject of immediate experience. To deny this, it is said, is to overlook the difference between a psychological and a psychical analysis.²⁸ But it is not at all clear in what

²⁷ *The Monist*, XXXVI, 1920, p. 27.

²⁸ *Psychological Principles*, p. 105.

sense this psychological analysis is then an analysis of experience as it is for the experiencing individual. Does it not clearly show that it is necessary for the psychologist often to view the experience he is investigating, not from the standpoint of the experiencing individual but from that of his own? Is it not then mere sophistry, however cleverly concealed by terminological distinctions, to deny that psychology studies individual experience not necessarily from within but *ab extra*? The fact is that our knowledge of a thing or event cannot be adequate except in terms of self-conscious experience, and when therefore that event or thing is *ex hypothesi* of a nature different from what can be realized in self-consciousness, there can be no knowledge. The conditions of knowledge being absent, that thing remains inaccessible and inscrutable. And the reason is that the conditions of self-consciousness are really the conditions of knowledge.

We may then summarize this portion of our contentions as follows. The psychologist's fallacy, as explained by our eminent psychologists, far from being a defect to be removed from psychological descriptions, enters necessarily into all intelligible descriptions of facts. In describing and explaining mental events, in tracing the development of experience from one stage to another, or in analysing a complex psychosis into its constituent elements, the psychologist can as little lay aside his intellectual mechanism as a mason can put away his tool in building an edifice. And the demand that a psychologist should guard himself against the psychologist's fallacy and describe individual experience from the standpoint of the experiencing individual is as impossible to meet as the demand that he should describe the indescribable or think of the unthinkable. This of course does not mean that a genetic study of mental facts is foredoomed to failure. On

the contrary, the genetic method, we believe, has been of immense value in psychology as much as in other departments of knowledge. Its special fitness for the study of mind lies in the simple fact that mind is essentially a process, a growth. But it is equally important to remember that in following the mind through the different stages of its development the psychologist has to reconstruct its process, and is therefore inevitably bound down by the conditions of reconstruction. No knowledge, specially no knowledge of the past, is possible except through a constructive activity on the part of the knower. That the past is not immediately given, but has to be constructed out of what is given, ought to be now a commonplace of philosophy. And then it follows that the psychologist in tracing the growth of mind must of necessity construct or, say, reconstruct the past history of the mental evolution. And from this it follows further that what defies reconstruction cannot be described in intelligible terms.

Ward's Biological Bias.

What prevents Ward from clearly realizing this truth is perhaps his pre-occupation with biological concepts. Having rightly insisted on the duality, as distinct from the dualism, of experience, he has no difficulty in exposing the shortcomings of mechanical and chemical categories in the description of mind and mental evolution. But he still continues to represent the subject-object relation as something like the relation between the organism and its environment. The subject with the capacity to feel and act, and armed with the single power of attention, is represented as confronting a sensori-motor continuum, almost in the same way in which an organism is confronted with its environment. It is true that the essential distinction between these two types of relation is sometimes

recognized, and then it is said that experience is life as it is for the living individual, and not like the "interaction of organism and environment with which the so-called biologist is exclusively concerned, and where both organism and environment are objects for a distinct observer."²⁹ And then it is rightly urged that in respect of the subject-object relation, as the absolutely ultimate relation within experience "we can either say that it is inexplicable, or that it needs no explanation, or we may entertain the notion of an Absolute, in whom the unity of experience outlasts the duality."³⁰ These alternative courses, however, are not followed by Ward. They are, according to him, preferable courses in comparison with that which brings the subject-object relation under the category of cause and effect. Experience, Ward seems to think, vouchsafes only *interaction*, and not causal relation between subject and object. "Given a subject, or centre of experience, and such an objective complement; then the most salient feature is their interaction; the feelings that objective changes induce in the subject, and the actions to which such feeling leads."³¹ Now, interaction is essentially a biological category, and it is difficult to see how, in spite of its superiority to the category of cause and effect, it can effectively disarm the force of the criticism which Ward has brought to bear upon the cause-effect category as representing the subject-object relation. If the subject-object relation is presupposed by and therefore not explicable in terms of cause and effect, is it any the more explicable under the category of interaction? Does not the latter category presuppose as much the subject-object relation as the former?

²⁹ Naturalism and Agnosticism, II, p. 111.

³⁰ *Ibid.*, p. 117.

³¹ *Ibid.*, p. 125.

The fact seems to be that Ward has not done sufficient justice to his insight that the subject-object relation is ultimate. Being under the fascinating influence of a new fruitful discovery, he was naturally blind to its limitations, and so fondly clung to the biological category of interaction in explaining not only what was imperfectly explained by the mechanical and the chemical categories, but in explaining even that ultimate relation which is presupposed by every specific relation within experience. While rightly discovering the absurdity of identifying the subject of experience with the organism "which is but a special object among others,"³² while realizing that it would be "a mistake to seek to explain the individuality of the psychological subject by reference to the individuality of the organism,"³³ and lastly, while detecting the fatal ambiguity of the term mind or ego as meaning "the unity or continuity of consciousness," as well as, the subject to which this unity is presented,³⁴ Ward fails to work out all the implications of his position, mainly on account of a strong biological bias. It will be interesting to consider certain other aspects of the doctrine to which he is committed by his prejudices for biological categories.

Thought as the Principle of Concretion.

It is one of Ward's oft-repeated assertions that immediate experience is concrete living and real, while concepts are abstract and ideal. Thus with regard to space, time, matter and force, alike he distinguishes between perceptual realities and abstract conceptions. The trans-subjective object, according to Ward, is "always in some measure general or abstract; in other words, concep-

³² Naturalism and Agnosticism, II, p. 127.

³³ Psychological Principles, p. 36.

³⁴ Psychological Principles, p. 39, also p. 423.

tual."³⁵ The universal and necessary factors of experience are due to intellectual elaborations, and "the further this intellectual process extends, the more abstract the result; as, for instance, if we were to say not, The sun warms the stone, but Ethereal undulations produce molecular vibrations." And then it is remarked that "however far such operations extend, their results are only valid or objective provided they rest ultimately on a basis of immediate experience." Similarly, with regard to space and time, a distinction, it is held, should be drawn between that which is perceived and that which is conceived, or, again between the psychological and the epistemological.

Now, the first point that deserves consideration in this connection is the distinction of immediate experience from concepts. It clearly reminds one of the pre-Kantian empiricism with its reduction of thought into mere abstraction, and particularly its emphasis on mere feeling. This theory, however, was at the basis of a philosophy which, according to Green, "was with Hume played out."³⁶ But the emergence of the theory in contemporary thought, and the rigorous application of what has so long been supposed to be a false principle to different fields of enquiry can be accounted for only on one hypothesis. Hume has somewhere remarked that when a controversy has been in the field for a considerable time without the prospect of a satisfactory solution, it may be taken as a proof that there is an ambiguity in the terms used by the disputants. And if Hume had lived in our time, he would easily see that the distinction between the function of immediate experience and that of thought in contemporary philosophy is based on a particular sense in which the

³⁵ Naturalism and Agnosticism, II, p. 184.

³⁶ Green, Works, I, p. 371.

term 'concrete' is freely used. Nobody can actually deny that there is something in immediate experience which cannot be reduced entirely to mere thought, and in this sense, there is a valuable element of truth in the contention that "if pure being is pure nothing, pure thought is equally empty."³⁷ A feeling, for instance, that is felt actually at the moment is surely more concrete and living than the concept of feeling, and regarded in this light, conceptual thought is comparatively abstract. But the term 'concrete' also means in philosophical literature that which is a whole, and consequently, we are said to make an abstraction when a part is torn out of the whole and then substantiated as a *res completa*. Thus, for instance, the flower as presented to an anoetic consciousness, if such a consciousness exists at all, however immediately apprehended, is not the complete flower as it exists. To know the flower in its existential concreteness, it must be determined in all those multifarious ways, and apprehended through all those fundamental relations which intellectual elaboration or interpretation essentially implies. The sense-presented flower, though it is as immediately grasped as a feeling, is yet an abstract entity; for the obvious reason that sense does not *ex hypothesi* refer it to the conditions under which alone it exists as a real thing. The category of cause, for instance, is one of the conditions that enter into the existence of the flower, though it is not presented as such to the immediate experience. In this sense, our conceptual knowledge, far from being abstract and untrue, is emphatically concrete and real; and thought is the principle not of abstraction but of concretion.

When in this manner we get rid of the fatal ambiguity lurking in the terms 'concrete' and 'abstract,' it will be

³⁷ Psychological Principles, p. 293.

easily seen that to condemn the Kantian categories as the 'most abstract' concepts is to accept uncritically an account of the categories and of thought which it has been almost a characteristic feature of empiricism to advocate, both before and after Kant. The *summa genera* of the scholastic philosophers into which the Aristotelian theory of categories degenerated were falsely identified by John Stuart Mill with the categories as the ultimate presuppositions of knowledge and existence. And it is regrettable that the false view is not entirely rejected even by such an acute critic of presentationism as Ward undoubtedly is. Here, again, we are inclined to believe that the ultimate reason of Ward's failure is to be found in his biological bias. Attention, the single activity supposed to belong to the subject, is conceived as analogous to, though not identical with, the response of the organism to its environment. And this prevents Ward from seeing the real nature of the interpreting, the organizing or the synthesizing thought. It is true that according to him, there is a synthesizing or integrating process which "is begun at the lower or perceptual level of experience and continued at the higher or intellectual level,"³⁸ but this process is wrongly identified with the activity of attention and the tendency to anthropomorphic interpretation. Knowledge being the process through which the world exists for us, it is extremely misleading to view the interpreting process of thought as merely the process of differentiating and integrating an objective continuum.

Conceptual Knowledge and Reality.

This brings us once more to the contrast, which Ward is never tired of insisting on, between the standpoint of psychology and that of epistemology, and particularly the

³⁸ A Study of Kant, p. 80.

contrast of the psychological *a priori* with the epistemological *a priori*. It is one of his repeated warnings that we must not confuse the concept of space-time with the experience of space-time. "That the knowledge of space" he urges "is *a priori* in the epistemological sense it is no concern of the psychologist either to assert or to deny."³⁹ Now, can we not equally say, reversing Ward's remark, that the knowledge of space-time is not psychologically *a priori* it is no concern of the epistemologist either to assert or to deny? So far as the psychological question is concerned Ward's account may be true or, again, it may be false as shown by Stout, who is uncompromising in holding that "this merely sensuous unity is not sufficient" for explaining the growth of the knowledge of external world.⁴⁰ But we must recognize, he urges, that from the outset there must be "some germinal apprehension of the unity of the world," and that "such categories as spatial unity, temporal unity, causal unity belong even to rudimentary perceptual consciousness as a condition of its further development." Nor again are we to decide on the psychological validity of Ward's explanation of space-perception in contrast with that of another eminent psychologist of our time who holds that there can be no perception of space without the constructive activity of mind "to which the sense-stimulations and the qualities of sensory experience that immediately follow upon them are the provocation."⁴¹ From these alternative theories of space-perception, we may, however, see clearly that it is futile to appeal to psychology even of the most modern type in order to expose the defects of Kant's account of space as epistemologically *a priori*.

³⁹ Psychological Principles, p. 144.

⁴⁰ Manual of Psychology, 4th edition, p. 413.

⁴¹ Mr. MacDougall, Outline of Psychology, p. 245.

The question that is all-important from the stand-point of knowledge is whether space-time is not involved in any account of the growth of individual experience which passes through different levels of development, and whether the *conceived* space-time is not objectively real in contradistinction from the 'concrete perceptual' space-time. The objective reality of time as a succession of events, for instance, is presupposed by every psychologist who ventures to give a genetic account of experience, and then it is not in terms of the time as perceived but in terms of the time as conceived that the genetic account becomes intelligible. The concept may be, as Ward would have us believe, "at once *abstract* and *ideal*, but it is in terms of the conceptual time alone and not in terms of the Bergsonian duration, that the gradual and successive development of experience can be understood. Are we then to reject the conceived time as "the pendant of geometry?" Can development be understood except in terms of the "abstract time of science in which we imagine the successive states of the whole phenomenal world to be plotted out?"⁴² In fact, however, Ward himself suggests that the real time is what we conceive it to be, and says explicitly that whatever may be our intuition of time, the time as we conceive it is time as *it is*.⁴³ But if this be granted, then, epistemology, far from presupposing psychology, is really presupposed by psychology; and reflection, even if it be something which comes to be at a particular stage of the development of individual experience, is the medium through which alone an objective development is intelligible. In other words, conceptual knowledge is not abstract in the derogatory

⁴² The Realm of Ends, p. 305.

⁴³ Psychological Principles, p. 213. Italics in the original. Similarly, Stout: Objective time is thus an ideal construction—Manual of Psychology, 4th edition, p. 568.

sense of being something that gives us a partial view of reality or a false view of real things. And it follows also that to talk of a correspondence between conceptual knowledge and reality is to court misunderstanding, suggesting as it does a different type of knowledge through which reality exists for us, with which we are to compare our conceptual constructions. If, on the other hand, it is found that even the staunchest critic of conceptual knowledge has to construct in spite of himself and thus assume implicitly the validity of conceptual constructions, this by itself is a transcendental type of proof showing the *a priori* validity of concepts as also the futility of instituting a comparison between conceptual knowledge and reality.

The fact is that concepts, as Kant urged long ago, are rules that unify knowledge and there can be no knowledge without a concept "however indefinite or obscure it may be." And the ultimate source of the conceptual constructions is the subject that knows, call it the pure ego or the transcendental unity of apperception. Now, there is no doubt that Ward too admits in a sense that the experient subject is the source of the real categories of substance and cause, and that "the world is *intelligible* only when it is interpreted in terms of what the experient subject at the trans-subjective and self-conscious level knows itself to be."⁴⁴ But then he interprets these categories in the anthropomorphic sense and thinks that all Kant meant by the transcendental conditions of knowledge is this that the "permanence and activity of the subject itself are analogically projected,"⁴⁵ at the transcendental level of experience. And if this be the upshot of Kant's reply to Hume, then we must agree with the critics of Kant in the remark that Kant's vast transcen-

⁴⁴ A Study of Kant, p. 83.

⁴⁵ *Ibid.*, p. 134.

dental machinery is a signal failure.⁴⁶ For, Hume would have surely retorted that "to convince us how fallacious this reasoning is, we need only consider, that the will being here considered as a cause has no more a discoverable connection with its effects than any material cause has with its proper effect."⁴⁷ We venture to think, however, that Kant's transcendental conditions of experience are not the anthropomorphic projections at the transcendental level of experience. On the contrary, they are the presuppositions of even the anthropomorphic projections. That is, Kant's reply to Ward would be essentially the same as his reply to Hume. All descriptions of the origin of the categories, he would say in effect, can be intelligible only in terms of the categories themselves, and consequently must be vitiated by "a sort of *generatio aequivoca*," and this irrespective of the modes in which they are supposed to have originated. Whether the categories are described as having originated from the habits of imagination or from the anthropomorphic projection, the psychologist assumes the universal validity of the causal principle in the *logical sense*, in so far as he is thinking of the *origin* of the categories as a real fact of the world.

The Logic of Agnosticism.

There are certain other aspects of Ward's philosophy in respect of which also he may truly be regarded as the mouth-piece of the spirit of the age; but we are not concerned with them in the present context. We may, however, conclude with a warning against a possible misinterpretation of our criticism of Psychology. Nothing we have so far said is meant to decide on the merits of the competing theories about the psychology of knowledge as it

⁴⁶ J. H. Stirling's article in *Mind*, 1885.

⁴⁷ Treatise, I, iii. xiv.

is conceived now. Whether all-knowing begins with sensory experience or with experience referred to something beyond itself, it is for the psychologist to discover. Similarly, it is none of our purpose either to defend or to attack the widely respected opinion that, as a matter of history, the self-conscious level has been attained at a particular stage of the psychological individual's development, or that "the human mind, like the human body, is the outcome of a long and highly specialized evolution."⁴⁸

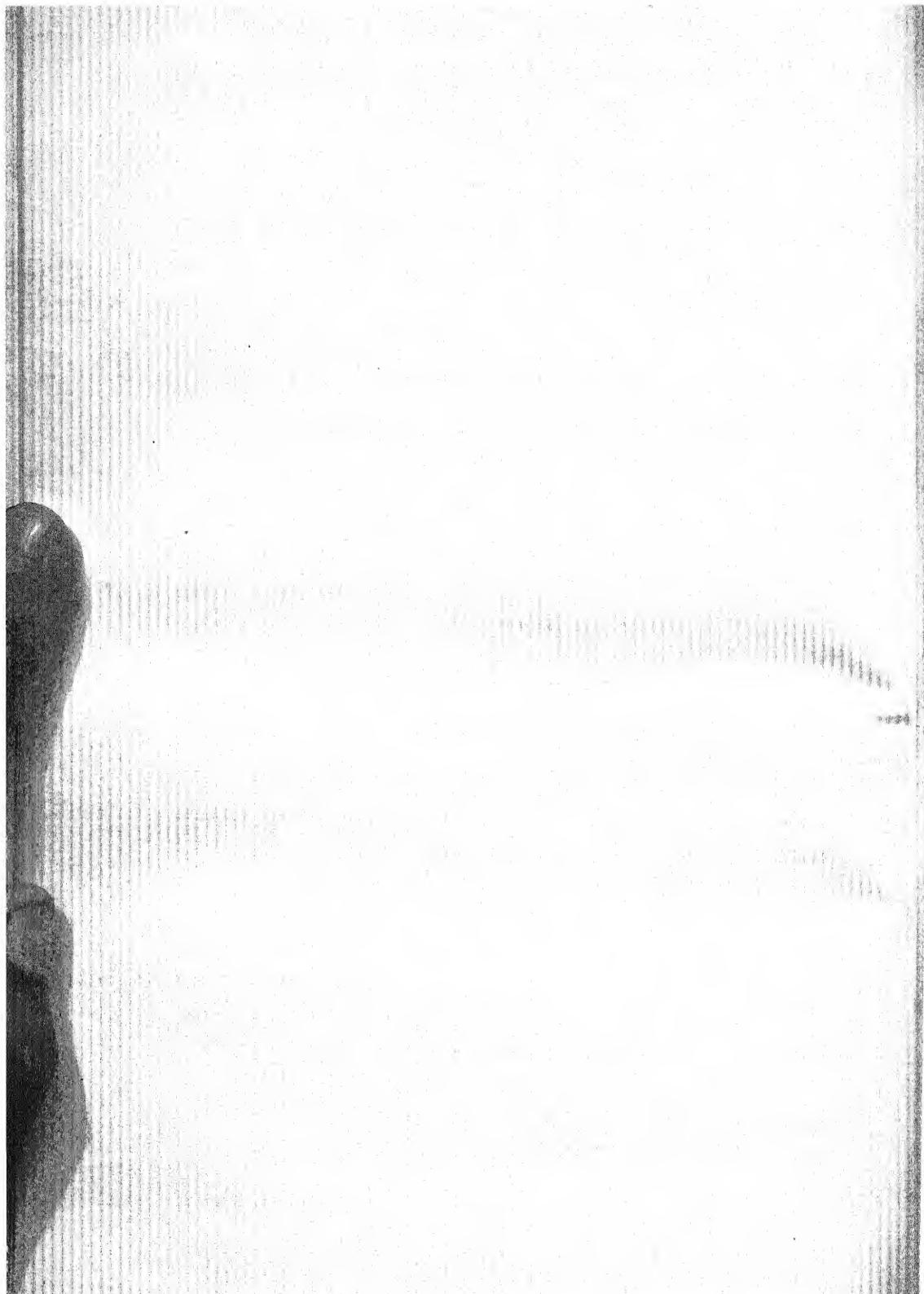
All we have attempted to show is that a psychology of knowledge must necessarily presuppose the validity of those ultimate principles which lie at the basis of thought and existence. That is, even if it be granted that self-consciousness together with the formative principles of knowledge come to exist at a particular stage in the development of individual experience, we cannot consider this fact as a ground for rejecting the findings of the self-conscious individual who necessarily interprets facts in accordance with the logical categories. The psychologist himself, for instance, is at the self-conscious level, and his description of "the successive stages in the advance from the one level of experience or knowledge to the other" must be in terms of the categories in the logical sense, and he will surely repudiate the suggestion that the description is purely anthropomorphic and, as such, may or may not correspond to real facts. If then it is admitted that the individual experiences which he describes are real facts in the world, and if it be further admitted that he cannot accept the Lockian opposition of what is real to what we "make for ourselves" then the logical categories must be in the individual experiences though the individual may not be fully conscious of them. Ward admits that the human standpoint is the highest and the nearest to us,

⁴⁸ Prof. L. T. Hobhouse, *Mind in Evolution*, p. 369.

but the question is not in fact one of temporal relation between one stage of development and another. The problem rather is whether any description can be made intelligible except in terms of the categories, and whether every description should not assume the objective validity of the categories. Further, if we agree with Ward that the subject of experience, though last in the order of knowledge, is yet first in the order of existence, should we not extend this insight to the case of the categories as well?

A psychology that denies these plain considerations must be inevitably landed in the inextricable difficulties of naturalism and agnosticism. The spectre of the Thing-in-itself being the inevitable consequence of the attempts to limit thought within a part of reality, it is bound to visit us as often as we raise a wall between thought and reality, irrespective of the point at which it is erected. We may either limit thought within the field of appearance, or within the four walls of trans-subjective experience, the logic of the situation remains the same. And while the logic remains unchallenged, it is immaterial whether we are engaged in tracing the evolution of mind from matter or that of thought from sense. If the absolute homogeneity of Herbert Spencer be, as Ward rightly remarks, equal to nothing, then his own proposal to begin with a mere sensori-motor continuum cannot meet with a better prospect. We need not here prejudge the issue that divides the temporalist from the eternalist, and consider how far the recognition of the failure of psychology to trace the genesis of the logical categories should commit one to Green's theory of an Eternal Intelligence, and whether Green's is the only alternative to naturalism and agnosticism. But we believe he was essentially right in his incisive remarks on the pretensions of psychology to offer a satisfactory theory of knowledge.

SECTION III
SANSKRIT



GAUDAPĀDABHĀSYA AND MĀTHARAVRTTI*

BY

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ध्यात्वा तीर्थपति॑ ततो गणपति॑ सूगाभिधानां प्रसूं
तातं श्रीजयदेवसंज्ञमनिशं सत्तर्कचूडामणिम् ।
नत्वा श्रीमधुसूदनं गुरुवरं भाष्यस्य वृत्तेस्तथा
पौर्वपर्यविचारमन्त्रं कुरुते श्रीमानुभेदः कृती ॥

SUMMARY

Dr. Belvalkar holds (1) that the Mātharavṛtti is the lost original of the Chinese translation of the Sāṅkhya work by Paramārtha, which he concludes from the comparison of the present Sanskrta version of the Vṛtti with that of the French, and (2) that the Gauḍapāda-bhāṣya is “merely a paltry abstract of the Mātharavṛtti.” Thus he places the Vṛtti *ante* 500 A.D. and the Bhāṣya *after* 700 A.D.

Prof. Dhruva says that the Mātharavṛtti is undoubtedly earlier, it being referred to as an example of *Noāgama Bhāva-cruta* in *Anuyogadvāra*. The present edition of *Anuyoga* is assigned to Āryarakṣita who lived in the second half of the first century A.D. Hence the Mātharavṛtti will have to be shifted to the early part of the first century A.D.

The above arguments are not tenable on the following grounds :—

1. The Vṛtti refers to a writer on the Sāṅkhya-Saptati which shows that the Vṛtti is not the earliest commentary.

* This Paper was submitted to the Sixth Session of the All-India Oriental Conference held at Patna, in December, 1930.

2. The Vṛtti quotes verses from Viṣṇu-purāṇa, Hastāmalaka-stotra of Caṅkarācārya, Cṛī madbhāgavata and Devībhāgavata. Viṣṇu-purāṇa cannot be earlier than 500 A.D.; Hastāmalaka belongs to the 8th century A.D.; Cṛīmadbhāgavata cannot be earlier than the 10th century A.D.; and the Devībhāgavata is almost of the same period. These show that the Vṛtti cannot be earlier than the 10th century A.D. at least.
3. The Vṛtti refers to the subdivisions of Lakṣaṇā which are attributed to the Navya-Naiyāyikas, who must be later than the 13th century A.D., the date of Gangeçopādhyāya, the founder of the Navya School of Nyāya.
4. Besides the elaborate and extensive style of writing, the details of *Samyoga* and *Hetvābhāṣas*, the specification of the views of the various schools of thought, and some of the unnecessary statements prove that the Vṛtti must belong to some later century of the Christian era.
5. The omission of the 73rd Kārikā from being commented upon by the later writers shows that the Vṛtti is not earlier than the other commentaries.
6. The Vṛtti refers to the view of a Sāṅkhya writer. This view is upheld by Gauḍapāda and others. Hence one can assume the priority of Gauḍapādabhāṣya.
7. Had Gauḍapādabhāṣya been later than the Vṛtti and an abstract of the latter, why should not the Bhāṣya include the commentary of the 73rd Kārikā? The Bhāṣya

not only omits the 73rd Kārikā which is found in the Vṛtti, but also the 70th, 71st, and 72nd Kārikās which have been included by all other later writers. This shows that the Bhāṣya is most likely the earliest of the commentaries.

8. The Bhāṣya never refers to the views of any Sāṅkhya writer.
 9. Besides, the style of writing shows that the Bhāṣya is from the pen of a master-hand while the Vṛtti is not so.
 10. The reference in Anuyoga may be of some other Māthara, whose work is still hidden in oblivion.
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" It is believed that the Mātharavṛtti is no other than the lost original of the Sāṅkhya-kārikā-vṛtti translated into the Chinese by Paramārtha between A.D. 557 and 569. This Paramārtha was a Brāhmaṇa of Ujjain, born in A.D. 499, and died in the year 569 A.D. He went over to China in A.D. 546 and translated into Chinese such Sanskṛt works as he might have brought with him from India; and as he might be presumed to have brought with him to China only such Sanskṛt works as had already an established reputation in India, we may roughly regard 500 A.D. as the *terminus ad quen* for the Vṛtti."¹

" That the Vṛtti is the original of the Chinese, follows from the close verbal correspondence that runs through them page after page, such occasional variation as is to be found in the Sanskṛt original and the French translation of the Chinese translation of the same in the Bulletin for

¹ Bhandarkar Commemoration Vol., Dr. Belvalkar's Paper, p. 172.

1904, pp. 978—1064, being no more than what could be explained away as the result of such genuine differences in reading as exist even in the Corean and Japanese recensions of the Chinese text itself. An instance or two must, therefore, here suffice :

The introduction of Kārikā, in Gaudapādabhāṣya, does not contain the dramatic dialogue between Kapila and Āsuri but the French on page 979 of the Bulletin ‘*O Āsuri, tu tāmuses à mener la vie d’ un mitre de maison,*’ etc., is word for word translation of the original भो भो आसुरे ! रमसे गृहस्थर्मेण etc. Similarly, the Mātharavṛtti gives, like the Chinese text, a gloss on the last three kārikās which is absent in Gaudapāda.”²

“ This discovery of the lost original of the Chinese translation and its identification with Mātharavṛtti of Mātharācārya compels us to admit the existence of two Gaudapādas, one the celebrated teacher of Cankarācārya, and the other, the author of the so-called Gaudapādabhāṣya, which is ‘ merely a paltry abstract of the Mātharavṛtti with an occasional addition here and there.’ ”³

“ Dates make it impossible that the Mātharavṛtti (*ante* 500 A.D.) be an enlargement of the Gaudapādabhāṣya (*post* 700 A.D.) and the close correspondence of the two precludes the possibility of their being independent works.”⁴ Further on, Dr. Belvalkar says, “ that the author of this abstract was a Gaudapāda, who, albeit later than the famous Gaudapāda, must nevertheless have lived before the 11th century follow from Alberuni’s reference (India, Vol. I, p. 132, Trübner Series) to a philosophical work composed by ‘Gauḍa, the anchorite’ and from

² *Ibid.*, footnote, p. 174.

³ *Ibid.*, p. 174.

⁴ *Ibid.*, p. 174, fn. 2.

Malladhāri Rājaçekhara-Sūri's mention in his Saddar-çanasamuccaya of a Sāṅkhya writer, Gauḍapāda, as distinct from Māthara."⁵

This is all what Dr. Belvalkar, who discovered the MSS. of the Vṛtti for the first time and can claim the first-hand knowledge of the work and its author, has said about the Vṛtti and its author Mātharācārya, and the Bhāsyā and its author, Gauḍapāda.

Professor A. B. Dhruva, in one of his papers,⁶ makes a side reference to this Vṛtti and its author. He wants to place the Vṛtti in the second half of the second, or first half of the third century A.D. He would rather like to shift this date to the early part of the first century A.D. The basis for this conclusion is a passage of the Anuyogadvāra which refers to Māthara. This passage runs thus⁷ :—

तं जहा भारहं रामायणं भीमासुरक्खं कोदिल्लवथं धोडयमुहं कप्पासिश्रं नागसुहुम
कण्णगसत्तरी द्वृसेसिश्रं बुद्धसासरणं काविलं वेसिश्रं लोगायंतं (ययं) सट्टितंतं माठर पुराण
वागरणं नादगाहैँ ।

This is all that Prof. A. B. Dhruva has to say. Summing up the arguments of Dr. Belvalkar we find (1) that according to him the date of the Vṛtti is *ante* 500 A.D. and the ground that he has adduced for this conclusion is that the Mātharavṛtti is the lost original of the Chinese translation by Paramārtha, which Dr. Belvalkar has come to know through the comparison of the present Sanskrta version with the French translation of the Chinese translation; and (2) that the Gauḍapādabhāṣya is "merely a paltry abstract of the Mātharavṛtti with an occasional addition here and there."

⁵ *Ibid.*, pp. 174-175.

⁶ Proceedings and Transactions of the First Oriental Conference, Poona, p. 275.

⁷ *Ibid.*, p. 270.

As there are two parts in the above arguments, the present paper will have two sections accordingly : one for proving that the so-called Mātharavṛtti can in no way be placed in any of the earlier centuries of the Christian era. It may be placed in the 10th century, or even very late; and another section to show that the Gauḍapādabhāṣya is an earlier work than the Mātharavṛtti and that the latter most likely utilized the Bhāṣya as its basis.

SECTION I

The following are the reasons which would prove the untenability of the views of both Dr. Belvalkar and Prof. Dhruva :—

1. The Vṛtti refers to the views of *apare*, *kecit*, *bhavatā*, etc. No doubt, these generally refer to some other writers either of the same school and on the same subject, or of some other school. Here in this Vṛtti *apare*, for instance, twice⁸ may refer to the authors of other school, but in one place⁹ it actually refers to a writer on the Sāṅkhya-Saptati. This being so, we cannot call the Vṛtti the earliest commentary on the subject.
2. The Vṛtti quotes a verse with full reference from the Viṣṇu-purāṇa.¹⁰ This Purāṇa is one of the earliest of the Purāṇas. " Yet it is precisely this Purāṇa," says Dr. Winternitz, " which lacks all references to special feasts, sacrifices and

⁸ अपरे पञ्चावयवमित्यपरे, pp. 10, 12, Chowkhambha Sanskrit Series Ed.

⁹ अपरे पुनरित्यक्षुरं वर्णयन्ति, p. 31.

¹⁰ उत्पत्तिं प्रलयं चैव भूतानामागति गतिम्।

वेत्ति विद्यामविद्याच्च स वाच्यो भगवानिति—श्री विष्णुपुराणे षष्ठांडशे पराशरवचः ।
(a) Mātharavṛtti, p. 37; (b) Adhyāya V, Verse, 78, Bombay Ed.

ceremonies dedicated to Viṣṇu; not even Viṣṇu temples are mentioned, nor places sacred to Viṣṇu. This already leads to an assumption of the great antiquity of the work. It is no more possible to assign any definite date to the Viṣṇu-purāṇa than it is for any other Purāṇa. Pargiter (Anc. Ind. Trad., p. 80) may be right in thinking that it cannot be earlier than the 5th century A.D. However, I do not think that it is much later.”¹¹ This being the fact, how can we agree either with Dr. Belvalkar, who places this Vṛtti *ante* 500 A.D., or with Prof. Dhruva, who holds that the Vṛtti is a work of the 1st century A.D.? This proves that the Vṛtti is later than the 5th century A.D.

3. While commenting upon Kārikā 39, the Vṛtti says :— “ यथा दर्पणाभाव आभासहानौ ” इत्यादि. Undoubtedly, this refers to the well-known verse¹² of the Hastāmalaka-stotra of Čaṅkarācārya, who is generally believed to have lived and written in the 8th century A.D. How can then we say that the Vṛtti, which quotes a line from the work of the 8th century A.D., is a work written before 500 A.D., or in the 1st century A.D.? On this ground we cannot place the Vṛtti earlier than the 8th century A.D.
4. Further on, the Vṛtti refers also to other

¹¹ A Hist. of Ind. Lit. by Dr. Winternitz, Vol. I, pp. 544-545, Ed., 1927.

¹² यथा दर्पणाभास आभासहानौ मुखं विद्यते कल्पनाहीनमेकम् । etc., Verse 4, Calcutta Ed.

Purāṇas and quotes verses from Cṛīmad¹³—and Devī¹⁴-bhāgavatas. About the date of the former, Dr. Winternitz holds that “Nevertheless it belongs to the later productions of Purāṇa literature. There are good grounds for assigning it to the 10th century A.D.”¹⁵ Devībhāgavata also cannot be much earlier than this. There are besides enough influence of the Purāṇas on the Vṛtti of some of the Kārikās.¹⁶ This places the Vṛtti even later than the 10th century A.D.

5. The Vṛtti on Kārikā 5 reads— “तत्र लक्षणात्रैविध्यम् जहस्त्वर्णा॒॑जहस्त्वर्णा॑, जहदजहस्त्वर्णा॑ चेत्यादि प्रमाणशास्त्रे^{१७} बहुतरः प्रपञ्च आत्मे”
This subdivision of Lakṣaṇā is attributed to the Navya-Naiyāyikas.¹⁸ The school of Navya-Nyāya was founded by Gangeśa-

¹³ (a) यथा पंकेन पड़ाम्भः सुरया वा उराकृतम्।

भूतहत्यां तथैवैमां न यज्ञैर्मार्घ्यमर्हति—Māthara, p. 8.

Bhāgavata reads in the second line तथैवैकां in place of ‘तथैवैमां’—
Bhāgavata, I. 8. 52.

(b) उत्तर्लक्ष—

एष आनुरचित्तानां मात्रास्पर्शेच्छया विमुः।

भवसिन्दुप्लो दृष्टो यदाचायानुबृत्तं नम्—Māthara, p. 69.

While Bhāgavata reads this as—

एतदृथ्यानुचित्तानां मात्रास्पर्शेच्छया सुहुः।

भवसिन्दुप्लो दृष्टो हरिचर्यानुबृत्तं नम्—I. 6. 35.

¹⁴ रजसा मिथुनं सत्त्वं सत्त्वस्य मिथुनं रजः।

उभयोः सत्त्वरजसोर्मिथुनं तम उच्यते—Devībhāgavata, III. 8. 49-50;

Māthara, p. 22.

¹⁵ A. Hist. of Ind. Lit., Vol. I, pp. 555-556.

¹⁶ Mātharavṛtti, pp. 56-57.

¹⁷ By Pramāṇaçāstra we should understand that branch of thought which is based on the Pramāṇa-Sūtra of Gautama प्रत्यक्त्वानुमानेऽपमानशब्दाः प्रमाणानि I. 3.—only. Such a section of thought is no other than the Navya-Nyāya founded by Gangeśa.

pādhyāya of the Mithilā school of Nyāya. Gangeṣa lived in the 13th century A.D.¹⁸ Hence the term Navya-Naiyāyika can be attributed to the Naiyāyikas who lived after the 13th century. If this be the fact, this single evidence places the Vṛtti later than the 13th century.

6. That the Vṛtti was written in the modern period of Nyāya is further corroborated by the following :—

- (a) The generally recognized subdivisions of *Samyoga* are three—अन्यतरकर्मज, उभयकर्मज and संयोगज; but here in the Vṛtti²⁰ we find some six subdivisions, such as :—

- (i) अन्यतरकर्मजो यथा स्थाणुशयेनयोः;
- (ii) सम्पातजो द्वयोर्वा संयोगो यथा द्वयं गुलाकाशयोः;
- (iii) स्वाभाविको यथा अग्न्युष्णयोः;
- (iv) शक्तिहेतुको यथा मत्स्योदकयोः;
- (v) यादच्छिको यथा सुपर्णयोर्वा;
- (vi) अर्थहेतुको यथा प्रधानपुरुषयोः !

It is obvious that this sort of hair-splitting is due to the influence of Navya-Nyāya.

- (b) The old Nyāya-Vaiśeṣika school of thought recognized only five kinds of *Hetvābhāsas*. Māṭharavṛtti, on the other hand, informs us that there are 33 kinds of fallacies : 9 of *Pakṣa*, 14 of *Hetu*, and 10 of *Nidarçana* or *Drṣṭānta*. Such detailed treatment of

¹⁸ Nyāyakoça of Jhalkikar, p. 700, 3rd Ed. Notes on Tarkadīpikā by Bodas, p. 345, Bombay Sans. Series, Ed. 1918.

¹⁹ The Princess of Wales, Saraswatibhavana Studies, Vol. III, p. 133.

²⁰ On Kārikā 21.

Hetvābhāsa is not found in the old and mediæval school of Nyāya-Vaiçesika. The modern Nyāya-Vaiçesika school only can claim such treatment. Hence we will have to say that there is enough influence of the Navya school of Nyāya-Vaiçesika upon the Vṛtti which is not possible if we place the Vṛtti either before 500 A.D., or in the 1st century A.D. The non-orthodox school's influence upon the Vṛtti regarding this problem also cannot place the Vṛtti *ante* 500 A.D., or even earlier.

- (c) The Vṛtti refers to the views of other schools here and there with considerable specification, such as, अन्न वैशेषिकाः; वराका जीवकाः; एष बौद्धानां पत्रः; वैदान्तवादिनोऽप्येवमाहुः; etc. This sort of specification is not generally found in works written in earlier centuries. Whenever the writers of these centuries quote others' views, they generally do so saying as : अपरे, अन्ये, केचित्, etc.
- (d) The elaborate and extensive style of writing, which is not always recognized and which does not fit in a philosophical work, is almost everywhere found in the Vṛtti. The Vṛtti on the very first Kārikā can verify the above statement. No one can see any strength in the arguments कार्याधिकं जनद्रव्यभूषणाय स्वशक्तिल्यापनाय च स्वस्तपमपि रोगं पुरस्ताद्वर्धयन्ति भिषजः²¹; पितरि जीवति पुत्रो न स्वतन्त्रः²² etc. Examples of this sort are not rare in the book.

²¹ Vṛtti, p. 5.

²² Ibid., p. 19.

- (e) The practice of writing big comments in the beginning and its gradual decrease later on also proves that the Vṛtti cannot be as old as the scholars have proved.
- (f) Lines like—यदिमन् देवदत्ते यज्ञदत्ते वा रज उल्कटं भवति स कलहं
मृगयते,²³ चुम्बक इव लोहस्य,²⁴ यथा गङ्गायाँ स्रोतांसि समुद्र-
तानि गङ्गामारभन्ते²⁵, यथा कस्यचिद्राजकुमारस्य मातापितृभ्या-
मुपचितस्य पञ्चमहाभूतानि कृतानि,²⁶ etc., are sufficient
proofs for placing the Vṛtti in some later
century. At least, these do not show that
the writer of this Vṛtti was a great scholar.

7. The last but not the least important point is this: It is a fact that originally the work contained 70 Kārikās and accordingly became known as Sāṅkhya-Saptati. Later on, somehow one of the Kārikās was lost and only 69 Kārikās have been handed down to us. There are five Sanskr̥ta commentaries available on the Sāṅkhya-Saptati. Of these, the commentaries of Ćaṅkarācārya (Ćaṅkarārya?)²⁷ Vācaspati-Miṣra, and Nārāyaṇa-Tīrtha possess three more verses at the end, which do not form part of the main work; that of Gauḍapāda possesses only 69 verses, while that of Mātharācārya has got 73 Kārikās. Now, if the Mātharavṛtti be the earliest commentary on the Sāṅkhya-Saptati, how

²³ *Ibid.*, p. 23.

²⁴ *Ibid.*, p. 9.

²⁵ *Ibid.*, p. 28.

²⁶ *Ibid.*, p. 56.

²⁷ Introduction of Jaymaṅgalā by Paṇḍita Gopinātha Kavirāja.

can we account for the omission of the 73rd verse from the text by the later writers on the Saptati? It is unwise to hold the view that the later writers were not aware of the existence of the Māṭharavṛtti and accordingly of the 73rd Kārikā which it possesses. The reason of this omission can be either that the later writers were not familiar with the Vṛtti, or that the Māṭharavṛtti did not exist before these later writers. The former alternative will not be accepted by the scholars and in that case, we will have to say that the Māṭharavṛtti is later than other writers on Sāṅkhya-Saptati.

Summing up the above arguments, we find that as the Vṛtti quotes verses from the Viṣṇu-purāṇa and Cṛīmad- and Devī-bhāgavatas, it can be said that the Vṛtti must be later than the 10th century A.D. In case, the subdivisions of Laksanā be really attributed to the Navya-Naiyāyikas and if the last argument be accepted as valid, the Vṛtti may be assigned even to a later date. But it cannot be earlier than the 10th century A.D. in any way.

As for the view that the Vṛtti is the lost original of the Chinese translation, I would like to say that as yet this Vṛtti has not been compared with the Chinese translation and would it not be assuming too much to base the conclusion on the French translation? Further, I add only what Dr. Keith has said; "The view that the original of this comment exists in the recently discovered Māṭhara-vṛtti is certainly wrong."²⁸

²⁸ Hist. of Sanskrit Literature by Dr. A. B. Keith, p. 488,
Ed. 1928.

SECTION II

Coming to the next point we know that Dr. Belvalkar has tried to prove that the commentary of Gaudapāda, known as the Bhāṣya, is merely an abstract of the Vṛtti of Māṭharācārya with certain additions here and there. But a close study of the Vṛtti and the Bhāṣya clearly shows that the view of Dr. Belvalkar is not at all tenable. The conclusion is in all probability just the opposite. The following are the reasons in support of the view of the priority of the Bhāṣya of Gaudapāda :—

1. The Māṭharavṛtti once refers to the view of another writer on the Sāṅkhya-Saptati and says— ‘अपरे पुनरिथङ्कारं वर्णयन्ति’. Now a question may be asked: Whom does this *apare* refer to? I have already said above that this presupposes the existence of a writer on the Sāṅkhya-Saptati who must have lived and written on the Saptati before the so-called Māṭharācārya, the author of the Vṛtti. This view to which reference is made by the author of the Vṛtti is found to have been upheld by the Bhāṣya, the Jayamaṅgalā, the Tattvakaumudī and the Candrikā. The date for the Tattvakaumudī is the 9th century and for the Candrikā the 17th century. As regards the age of the Jayamaṅgalā I can only say that it is earlier than the Tattvakaumudī of Vācaspati-Miśra, as the latter, in all probability, refers to the view²⁹ of Jayamaṅgalā in it.³⁰ Gaudapāda apparently appears to have lived before all

²⁹ Jayamaṅgalā, p. 54.

³⁰ Tattvakaumudī on Kārikā 51, p. 300, Balarāma's Ed.

these three writers. Now this *apare* must have been used at least for Gauḍapāda, if not for all others. On this ground I would like to say that most likely this Gauḍapāda lived before the so-called Māṭharācārya whose Vṛtti is before us.

2. I like to place Gauḍapādabhāṣya earlier than all these commentaries on the ground that Gauḍapādabhāṣya never refers to any author on Sāṅkhya-kārikā, while all others do; and which Gauḍapāda must have done when his views differ vitally from all others' on several topics. This is much more applicable to the case of the Vṛtti. Had the Gauḍapādabhāṣya been merely an abstract of the Vṛtti, why should Gaudapāda differ³¹ from Māṭhara without any reference to Māṭhara's views?
3. If Gaudapādabhāṣya be merely an abstract of the Māṭharavṛtti, how can we account for the omission of the commentary on the last four Kārikās which are found in the Vṛtti? Gauḍapāda is not only unaware of the 73rd Kārikā which is found only in the Vṛtti but also of 70th, 71st, and 72nd Kārikās which have been commented upon by all other writers. This shows that the Gaudapādabhāṣya was written before all these commentaries on the Sāṅkhya-Saptati.
4. It is due to this very fact that we do not find the views of any other school except that of the Buddhists mentioned and refuted by Gaudapāda while commenting upon the 9th

³¹ Differences in interpretation can be found under Kārikās 1, 5, 8, 9, 29, 51, 61, etc.

Kārikā, which deals with the Satkāryavāda like all others including Mātharācārya even.

5. Besides, the expression and style of writing of the Gaudapādabhāṣya when compared with those of the Mātharavṛtti show that the Bhāṣya is the original and not the Vṛtti as thought by others. A few instances will make the point clear.

Gaudapādabhāṣya

- (a) अल्पग्रन्थं स्पष्टं प्रमाणसिद्धान्तहेतुभियुक्तम् ।
शास्त्रं शिष्यहिताय समाप्तोऽहं प्रवृत्त्यामि³² ॥
- (b) अत्र दृष्टान्तो भवति—यथाऽचौरशचौरैः
सह गृहीतशचौर इत्यवगम्यते³³
- (c) तथा समुदयात् यथा गङ्गाश्रोतांसि त्रीणि रुद्रमूर्धं वि पतितान्तेकं श्रोतो
जनयन्ति³⁴
- (d) देवानां मानुषाणाञ्च वाग् वदति, श्लोकादीनुच्चारयन्ति³⁵

Mātharavṛtti

- (a) नमस्कृत्य तु तं तस्य वक्ष्ये ज्ञानस्थ कारणम् ।
हिताय सर्वशिष्याणामल्पग्रन्थसमुच्चयम्³⁶
- (b) अत्र दृष्टान्तशच्चकेचित् किल चौरा ग्रामं हस्ता द्रव्यं गृहीत्वा ग्रामान्तरं
गच्छन्ति कृतकार्याः । तैः सह सार्थेन श्रोत्रियो ब्राह्मणः पन्थानं गच्छति ।
तथदानुसारिभिरारचिभित्ते गृहीताः । कृतापराधैस्तैः सह सोऽपि
ब्राह्मणो गृहीतस्त्वमपि चोर इति । तद्यथाऽसावचोरस्तसंसर्गदोषेण
चैरतया ग्रतीतस्तैः³⁷
- (c) समुदयाच्च—यथा गङ्गायां स्रोतांसि समुदितानि गङ्गामारभन्ते³⁴
- (d) देवानां वाक् पादं पादार्थं श्लोकमुच्चारयति³⁵

These are some of the innumerable instances besides the entire commentary on the first two Kārikās which show

³² Gauda, p. 1; Māthara, p. 1.

³³ Gauda, p. 17; Māthara, p. 34.

³⁴ Gauda, p. 14; Māthara, p. 28.

³⁵ Gauda, p. 25; Māthara, p. 50.

that the Bhāṣya is from a master-hand while the Vṛtti is, as if, written by an unexperienced writer.

On these grounds, I would like to place the Gaudapādabhāṣya earlier than the Māṭharavṛtti. Truly speaking, even to an ordinary student of philosophy it will appear after the very first reading that the Gauḍapādabhāṣya is the original and the Māṭharavṛtti is based on it with additions and elaborations which are sometimes not at all necessary.

As for the reference to *Māṭhara* in the *Anuyogadvāra*, I would like to suggest that the present publication of the Māṭharavṛtti on which the entire criticism is based is not the work of that Māṭhara. It is quite possible that there was a Sāṅkhyā writer named Māṭhara whose reference is found in *Anuyogadvāra* and who might have written also a commentary on the Sāṅkhyā-Saptati; but that is still hidden in oblivion and perhaps lost for ever. But it is impossible, under the circumstances, when the internal evidences are so clear and strong, to accept the views of Dr. Belvalkar and of Prof. Dhruva as regards the present work which is attributed to Māṭhara.

A CRITICAL STUDY OF THE SĀṄKHYA SYSTEM
ON THE LINE OF THE SĀṄKHYA-KĀRIKĀ,
SĀṄKHYA-SŪTRA AND THEIR
COMMENTARIES

BY

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The aim of the paper is to give a clear-cut exposition of the Sāṅkhya in its more developed form. Such explanation is intended to reconcile the many surface irregularities, seeming incongruities and superficial inconsistencies, which usually strike the casual reader and critic. Such misconceptions are not the lot of the unwary and the uninitiated only. All have with one voice deprecated this or the other aspect of the system. In view of its general misunderstanding by all and sundry a new treatment of the subject will not be out of place.

A perfect thought-system should naturally grow out of its initial fundamental postulates, which do not require recurring subsequent reinforcements to account for all its developments. An attempt is made below to show that the Sāṅkhya does satisfy these requirements and that there is really no justification for the clamour which is usually raised against it.

There are two broad aspects of the Sāṅkhya which must be clearly distinguished in the present study; one is the Sāṅkhya before Iśvarakṛṣṇa's kārikā and the other is the Sāṅkhya after kārikā. There are undoubtedly many more types of the Sāṅkhya besides those which we shall

have occasion to touch upon in course of the brief survey of the history of the Sāṅkhya. This review is necessary for a fuller insight into the meaning of the kārikā terminology and the development of the kārikā conceptions. The above divisions into pre-kārikā, kārikā and post-kārikā Sāṅkhya are not intended to represent water-tight compartments without overlappings. The basis of classification in the three groups will be similarity of tenets and not mere chronological sequence. The consensus of opinion is that the pre-kārikā Sāṅkhya marks an embryonic state and that the post-kārikā a state of deterioration from the settled form in the kārikā. The pre-kārikā Sāṅkhya is vague and no complete book on the subject is extant. The few references we have are to be met with in unexpected, out-of-the-way contexts and these too are often found indifferently mixed up with other heterogeneous material. In dealing with this topic, therefore, emphasis will be laid only on facts that have in any way contributed to the shaping of the classical Sāṅkhya.

The Sāṅkhya is one of the oldest systems¹ of thought and we find it already prominent at the threshold of philosophical enquiry. The pre-kārikā Sāṅkhya is the characteristic product of an India newly stirred to its depths by the impulses of creative philosophical activity. In this period, the great systems of Indian thought have their fountain-heads. These springs were to remain, however, for long mere rills and rivulets of negligible magnitude, till in the period of the Upaniṣads we have them swelling into a mighty boisterous current, and this in its turn was to split up and settle down finally into the

¹ 'System' in this context does not imply that the Sāṅkhya had from the very beginning a well-planned scheme with some definite author to its credit, or that its tenets had taken their final shape.

six familiar channels of Indian philosophy which have watered through centuries this ancient land. The pre-kārikā Sāṅkhya, in the meanwhile, may be considered a notable legacy of the early thinkers.

The word Sāṅkhya first appears in the Sāntiparva of the Mahābhārata; and Sāṅkhya and Yoga in that book have been referred to as ‘*sanātane dve*.’ Sāṅkhya at times stands for knowledge only and in that sense it has to be distinguished from the Sāṅkhya, which is the name for a particular system. Sāṅkhya standing for the system should not be derived to mean ‘number’ because enumeration is not a characteristic feature of the Sāṅkhya. Other Indian systems far surpass it in this respect. The natural and traditionally accepted interpretation is from Sāṅkhya—*buddhi* or knowledge. The term Sāṅkhya was earmarked after a time for the particular system which believed in liberation through true knowledge of the difference of Prakṛti and Puruṣa. Jacobi refers to *pari-saṅkhyā* and distinguishes the practice of the Sāṅkhyas, who, when explaining the significance of a conception, give an exhaustive enumeration of things contained, from that of the Vaiśeṣikas, who give the *viśeṣas* or distinctive qualities. Guṇaratna² holds that the Sāṅkhya derived its name from its first founder, Saṅkha.

The Sāṅkhya was ignored, it is often said, on account of its atheistic tendencies. This argument as it stands is not correct. The Sāṅkhya was classed amongst the orthodox systems and therefore it always ranked higher than the monistic philosophy of Śaṅkara in which everything was reduced to non-entity except Brahman, or than the deistic Vaiṣṇavaite and Śaivaite doctrines. The

² In his commentary on Saddarśanasamuccaya, p. 22, Bibliotheca Ed.

acceptance of the authority of the scripture may have been a device on the part of the Sāṅkhyas, but it was successfully carried and they enjoyed all the advantages of an orthodox system without losing their own characteristic of maintaining the system purely rationalistic. To allow free thinking they are said to have denied the existence of God, which would hamper the progress of pure reasoning in ignorant minds. But the reason was otherwise. There was no place left for Him in the system, and Indian thinkers and Indian followers were bold enough to carry their conclusions to the logical ends, however horrifying the results may be to the popular mind, or they did not remain horrifying because they were logical.

Besides, the Sāṅkhya has not openly rejected the authority of the Vedas. It has definitely accepted the śrutipramāṇa as one of the pramāṇas, though śruti has a wider sense in the Sāṅkhya, meaning correct tradition or authoritative statement. The Sāṅkhya-Sūtra has a penchant for referring to śruti for validity. But judged otherwise, the Sāṅkhya has relegated *ānuśravika* methods in the removal of misery to a secondary place, though they are called *praśasya* in comparison to the Sāṅkhya method which is *śreyān*. Śaṅkara and other commentators of his type have questioned the Sāṅkhya interpretation of some śruti texts quoted for authenticity.

The Sāṅkhya is traced back to as early a text as the R̥gveda, the hymns (X, 221 and 129) of which give an idea of the creation of the world remotely resembling the series of Sāṅkhya evolution. References are made also to Atharvaveda, X, 8 and 43, which mention the lotus flower of nine doors, covered with three strands, and to Satapatha and Sāṅkhāyana Brāhmaṇas in which Ātman is called the twenty-fifth principle. But these point to the critics' ingenuity. The Sāṅkhya, or better no philosophical system,

can be easily traced from the Vedas. They were most likely composed when the Aryans were afraid of the natural surroundings of a newly discovered country. But there is no denying the fact that the Sāṅkhya had its origin in the Upaniṣadic literature, from which it slowly branched off into separate existence.

The crude materials from which the Sāṅkhya grew as a well-knit system of philosophy are strewn in great abundance over the whole Upaniṣadic literature, though they were arranged later under the Sāṅkhya. For that reason it is repeatedly urged by Western scholars that the Brahma-Sūtras of Bādarāyaṇa, which are a *samanvaya* form of the Upaniṣadic philosophy, truly mean what Rāmānuja represents and not what Śaṅkara superimposes. The crowning theory of the Upaniṣads is not pure dualism, but it is not unqualified monism also. It is preferably qualified dualism. They represent a period of great activity and Śaṅkara's theory of Māyā and its later developments had no chance of finding a place in them.

Kapila³ is considered the author of the Sāṅkhya-Sūtras as well as the first teacher of the Sāṅkhya. One Kapila cannot be both, because it is generally believed that the Sāṅkhya-Sūtras were compiled about the 14th century A.D.⁴ He is not a historical person. His name occurs in various contexts and somehow it came to be associated with the Sāṅkhya. He was known as a *siddha*

³ Ahirbudhnya Saṁhitā says that his theory was Vaiṣṇava and Vijñāna-Bhikṣu has also emphasised the theistic character of the Sāṅ-Sūtra.

⁴ Not later than Sarvadarśanasāṅgraha because one sūtra is quoted by Mādhvamantrin, who is contemporary of Mādhavārya.—‘Sources of Vijayanagara Hist.,’ p. 51 and J.O.R., Madras, 1928, p. 148.

in the literature of the Nāthas and in the *rasāyanaśāstra*.⁵ In the *Bhagavadgītā*, he is referred to as the best of *siddhas*. His case is classed in that of *janmasiddhi*. The assumption of *nirmāṇakāya* in Vyāsa's commentary on *Yoga-Sūtra*, 1. 25, attributed by Vācaspati to Pañcaśikha, implies that the Master had no physical body. He appears in *Śvetāśvatara*, 5. 2, as identical with Hiranyakarṇa. In the epic he is identified with Agni, with Viṣṇu and Śiva, and all sorts of views are attributed to him; and he is the teacher of a number of sages. Śaṅkara refutes the argument that Kapila of the Vedic texts was any great personage and identifies him with the Kapila who burnt the sons of Sagara. Buddhist legends mention him as a predecessor of Buddha.⁶

Kārikā 70 places Āsuri next to Kapila. Āsuri and Pañcaśikha are mentioned in *Mahābhārata* (12. 219) as teacher and pupil from which is picked up the statement of the Kārikā. The Sāṅkhya has an unbroken tradition from the time of Pañcaśikha⁷ as indicated by *śisyataram-parayāgatam* in Kārikā 71. He is considered to be the author of the first regular book on the subject and in that light, Bālarāma, while interpreting *samākhyātām* in Kārikā 69, says that the word means that Kapila only harangued and did not compile any book, the task being left to Pañcaśikha. In the *Mahābhārata*, Janaka professes himself to be a disciple of the beggar Pañcaśikha, belonging to the family of Parāśara. *Mahābhārata* and *Yogabhāṣya* present different accounts of Pañcaśikha's philosophical position. *Mahābhārata* itself has two separate views attributed to him in 12. 321 and 96—112. His views in 12. 219 do not

⁵ *Vide* the Introduction of *Jayamaṅgalā* by Pandit Gopinātha Kaviraj.

⁶ Compare *Brahmajālasūtra*.

⁷ Assigned to first century A.D.

correspond with the Sāṅkhya. He there holds *bala* as the sixth organ with reference to organs of action as *manas* is the sixth organ in relation with the organs of perception. His views correspond more with the Vedānta, where the separate existences of the individual souls finally merge into Brahman. He is considered the author of Śaṣṭitantra in Chinese tradition,⁸ and Svapneśvara in Kaumudī-prabhā assigns Sāṅkhya-Pravacana-Sūtra to him. Vācaspati identifies certain passages in Vyāsa's commentary on Yoga-Sūtra as his and they reappear in his name in the Sāṅkhya-Sūtra. From these extracts it can be said that his work must have been in prose. His views are more logical—that the souls are atomic in size, otherwise they could not be infinite in number; that the eternal connection of spirit is due to lack of discrimination⁹ and not to works or to psychic body. Buddhist texts mention a Gandhabba Pañcaśikha.¹⁰

The Chinese Sāṅkhya-Kārikā mentions Gārgya and Ulūka as Sāṅkhya teachers. In Buddhacarita, Arāḍakalāma refers to Jaigīśavya, Janaka and Parāśara as persons who obtained liberation through the Sāṅkhya.

Kārikā 72 declares that the subject-matter of the Saptati is based on Śaṣṭitantra with the exclusion of ākhyāyikā and *paravāda*. The Kārikā is perhaps a later

⁸ Compare Jayamaṅgalā.

⁹ Cf. Sāṅkhya-Sūtra, 6. 68.

¹⁰ Āsuri and Pañcaśikha adhere to a theistic Sāṅkhya that resembles the Sāṅkhya in the Mahābhārata.—Radhakrishnan. Pañcaśikha agrees with Caraka. Caraka excludes Puruṣa from the list of tattvas and Cakrapāṇi thinks that Prakṛti and Puruṣa both being unmanifested have been counted as one; Tanmātrās are not mentioned and senses are bhautika.—Dasgupta, 'Hist. of Ind. Phil.' p. 213. Pañcaśikha probably modified Kapila's work in atheistic light as shown by 'tena bahudhā kṛtam tantram' in Kārikā 70.

interpolation because the Saptati ended at Kārika 69 where Gaudapādabhāṣya finishes.¹¹ Does Śaṣṭitantra represent a work? The commentators do not touch the point. They differently enumerate the sixty topics that cover the whole Sāṅkhya and that have been successfully incorporated in the body of the Saptati. Vācaspati quotes Rājavārtika, which is in *anuṣṭubha* metre for their enumeration while Jayamaṅgalā repeats the same in *upajāti*. Paramārtha also quotes the same. The ten *maulikārthas*, according to others, represent the common or individual qualities of the *tattvas*, but Nārāyaṇa represents by them the twenty-five *tattvas* themselves though their classification is strange—(1) *puruṣa*, (2) *prakṛti*, (3) *budhi*, (4) *ahaṅkāra*, (5–7) three *guṇas*, (8) *tanmātrā*, (9) *indriya*, and (10) *bhūta*. Ahibudhnya-Śamhitā takes Śaṣṭitantra for a book having two *mandalas* of 32 *prakṛtis* and 28 *vikṛtis*. Chinese tradition refers to a Śaṣṭitantra of 60,000 verses and this can be a misinterpretation of *bahudhā kṛtam tantram*, as denoting that an extensive book was composed. There is the possibility according to Schrader of two Śaṣṭitantras—one in prose, the other in verse.¹²

Max Müller elevates the Tattvasamāsa to the pedestal of the basis of all later Sāṅkhya works. His arguments are that it is more popular amongst the panditas than the Kārikā; that it is a bare enumeration of principles and has many technical terms that are not met with in later

¹¹ See ahead, note on Kārikā 70.

¹² Vācaspati Miśra in Bhāmatī attributes Śaṣṭitantra to Vārsaganya, which can be supported by the Chinese tradition which ascribes Vindhyaवासा who is identified with Iśvarakṛṣṇa with rewriting of Vṛṣaganya's work; but if Vārsaganya is the teacher of Vindhyaवासा and Śaṣṭitantra is attributed to him, it is not probable that so late a work should have been the basis of the kārikā. But there is a doubt as to the identification of Vindhyaवासा with Iśvarakṛṣṇa.

works. For these very reasons Keith and Garbe assign it a later date.¹³ The very name suggests that it is an abridgment of some bigger work. The mention of *duhkha* looks like a device for novelty; and the acceptance of *devatās* over *indriyas* and *bhūtas* shows the influence of later Vedānta.

The appearance of Īśvarakṛṣṇa's Kārikā¹⁴ removes a period of uncertainty¹⁵ because it provides a clear and definite exposition of the Sāṅkhya to this day. It has been the basis of all later Sāṅkhya treatises and criticisms. The date of Īśvarakṛṣṇa¹⁶ is to be determined by Chinese sources. Paramārtha left India in 546 A.D. and translated a work which resembles the Kārikā and a commentary on it in his last period of literary activity which falls in 557—568 A.D. Another Chinese tradition is that Vindhyanvāsa,¹⁷ who is sometimes identified with Īśvarakṛṣṇa, comes before Vasubandhu. The date of Vasubandhu was placed in the last three-

¹³ Older than seventh century A.D. because it is referred to in Bhagavadajjukīyam and in Māmanḍur inscriptions—J.O.R., Madras, 1928, p. 145.

¹⁴ The Maṇimekhalaī account of the Sāṅkhya, a Tamil work, which has been assigned a date earlier than that of the Kārikā differs in many respects from the Kārikā.—J. of Ind. Hist., Dec. 1929.

¹⁵ Dasgupta divides the Sāṅkhya into three strata—(1) theistic, details of which are lost, but which is kept in a modified form in Pātañjaladarśana; (2) atheistic, represented by Pañcaśikha; (3) atheistic modification as the orthodox Sāṅkhya system.

¹⁶ Svapneśvara identifies him with Kālidāsa.

¹⁷ View of Vindhyanvāsa as reported in Slokavārttika, 393,704; Bhoja on Yogasūtra, 4. 22; Medhātithibhāṣya, 1. 55; Syādvadamañjarī, 117, and Guṇaratna on Sarvadarśanasamgraha is not always consistent with that of Īśvarakṛṣṇa.—Kaviraj in Introduction to Jayamaṅgalā. Vindhyanvāsa accepts only two types of inference and no *sūkṣmaśāriṇī*.

quarters of the 5th century, but it has been pushed back by N. Peri a century earlier and further pushed by V. A. Smith to 280—360 A.D. Therefore, Iśvarakṛṣṇa cannot be placed in the 4th century as Keith¹⁸ does. Dr. Belvalkar thinks that Vindhavāsa wrote a commentary on the Kārikā. He places Iśvarakṛṣṇa in the first century A.D. or the 1st half of the 2nd century. According to him Māṭharavṛtti is the basis of the Chinese translation and Iśvarakṛṣṇa must be at least two centuries earlier than Māṭhara because his Vṛtti is confused and it often misinterprets the Kārikā. But how can Dr. Belvalkar reach his date? He cannot utilize the date of Vasubandhu and he must depend on the translation by Paramārtha of the Kārikā and Māṭharavṛtti that appears in 557—568 for his evidence. Therefore, his date is entirely based on the confused nature of the Vṛtti and the time it must have taken to become so popular as to be picked up by Paramārtha for translation. But why allow that time? Paramārtha may not have had another recourse but utilize the Vṛtti which, though fresh, was essential on account of the very brief character of the Kārikā itself. Prof. A. B. Dhruva thinks¹⁹ that Anuyogadvārasūtra should be assigned to the latter part of the first century A.D. because it deals with Buddhism generally and does not refer to Nāgārjuna, Āryadeva, Asanga and Buddhaghoṣa, while in dealing with the Sāṅkhya it points to three works besides the general work of Kapila; and so he places the Kārikā in first century B.C. and Māṭhara in the early part of first century A.D.

¹⁸ Keith at another place holds that he cannot be later than 300 A.D.—‘Sāṅkhya System,’ p. 43.

¹⁹ *Vide* his paper in the proceedings of the First Oriental Conference,

Dr. Belvalkar does not consider that Hiranyasaptati is the same as the Kārikā. The work may have been so named because it brought to the author so many gold pieces, or because it treats of Hiranyagarbha. It can be a commentary on the Kārikā by Vindhavāsa. Dr. Takakusu and Prof. Dhruva identify Hiranyasaptati and the Kārikā, and according to Prof. Dhruva it was wrongly attributed to Vindhavāsa.

There was a very early commentary appended to the Kārikā as proved by the Chinese translation. Dr. Belvalkar identifies the commentary with Mātharavṛtti,²⁰ because there is a great similarity between the two and passages, which are in the Chinese translation and which are not in Gaudapādabhāṣya, are to be found in Māthara. The Chinese translation is not *verbatim*. It has been amplified at places to make easy for the Chinese to understand and to conciliate with their views.

Gaudapādabhāṣya is an abridgment of the Vṛtti and therefore this Gaudapāda cannot be the famous teacher of the teacher of Śaṅkara. He has been referred to by Alberuni who refers to one more commentary on the Kārikā and he ought to be earlier than Vācaspati. How then to account for the non-appearance of the last three Kārikās in the Bhāṣya? Gaudapāda comes later than Māthara and therefore their absence in the Bhāṣya cannot prove that by the time of Gaudapāda the last three Kārikās were not interpolated; it may be an oversight of his.

Jayamaṅgalā is wrongly attributed to Śaṅkara.²¹ It

²⁰ Takakusu holds that neither Gaudapādabhāṣya nor Mātharavṛtti can be the original of the translation, but it has some earlier commentary on which these are based.

²¹ See Introduction to Jayamaṅgalā by Pandit Gopinātha Kaviraj; besides Mr. Kavi identifies him with the author of Yogasūtra-bhāṣyavivaraṇa and places him about 1400 A.D.—*Vide* Literary Gleanings in Q. J. of the Andhra Hist. R.S., Oct. 1927.

cannot be his on account of the slipshod style. Benediction to *Lokottaravādi muni* makes it a work of some Buddhist. Saṅkarārya has to his credit two commentaries—on Kāmandaka's *Nītisāra* and Vātsyāyana's *Kāmasūtra*, known as *Jayamaṅgalā*. This very person seems to be the author of the commentary with that name on the *Kārikā*.

A more important side of the study of the early history of the Sāṅkhya is to see how it gradually developed into the classical form. The Sāṅkhya of the Upaniṣads is theistic and the dividing line between it and the Yoga is not clear. The Upaniṣads do not present a settled form of the Sāṅkhya. The number of the *tattvas*, their order and their conception remain to be made definite and uniform. The subjective side of the *guṇas* possibly develops from the conception that the individual self was the result of the envelopment of the Absolute in the three *guṇas*. The actual influence of these tendencies on the final shape of the Sāṅkhya cannot be ascertained on account of lack of historical data. As long as the one or two cardinal principles, e.g., *svarūpa* of *puruṣa* and *prakṛti*, were not settled, these stray currents of thought and appearances in the Upaniṣads and other literature may have helped in the formulation of the Sāṅkhya concepts; but once they were suggested and ready, the system could stand on its legs and follow unhampered and unassisted its course of development. It must have remained dependent on extraneous matter till that light did not dawn; and next it must have rejected all unaccommodating material. Besides reservations are to be made on the subjective side. In spite of the ideas prevalent, the conception may have come in a moment of inspiration—though such flashes can also be explained as a product of the imperceptible influences of the times.

The extreme disinterestedness of Puruṣa and the claim of Prakṛti, constituted of three *gunas*, to account for all the inner and outer world independently only as the Prakṛti's different manifestations without any inherent change, make the Sāṅkhya what it is. The earliest definite Sāṅkhya work that has come down to posterity is the Kārikā. Another important work, though not from the viewpoint of time, but from the viewpoint of development of thought is the Sāṅkhya-Sūtra. It comes much later and it softens the rigorous dualism of the Kārikā. The Kārikā is a composite, short, complete work and it has the advantage, on account of its early date, of having received the attention of a mass of commentators within and beyond the Sāṅkhya pale. They put their own stamp on the text. They are the reflex of the then conditions and they create many new centres of interest and activity. On account of these facilities a textual study of the Kārikā in its necessary and controversial details is attempted below. It is commonly read with the Tattva-Kaumudi and therefore Vācaspati's explanations are at times left out to be supplied by the reader.

KĀRIKĀ 1.—All pain²² is *mānasa* but it is divided into three groups on the ground of its separate causes. *Mānasa* (*ādhyātmika*) pain has been defined by Gauda²³ as separation from the desired and association with the undesired. Cessation of pain is not possible in the Sāṅkhya because pain being a form of *guna* and the latter being eternal pain must ever exist. Pain is only suppress-

²² Yoga holds that our desire for liberation is not actuated by any hedonistic attraction for happiness or even removal of pain, but by an innate tendency of the mind to follow the path of liberation. Also compare Suzuki—'Mahāyāna Buddhism.'

²³ Gauda stands for Gaudapāda.

ed and its recurrence is not possible because the seeds of ignorance, wherefrom pain sprouts, are all burnt.

Vācaspati has laboured hard to show that it refers to the concept formed of threefold pain and not to the whole compound. But what has he gained thereby?

Bhautika according to Vācaspati includes trees and stones and his division is based on the four classes:—(1) born of the placenta, (2) born from eggs, (3) born from perspiration, and (4) born by bursting open the soil. Nārāyaṇa understands by *bhūta* things that are harmful to mankind. Gauda thinks that it means the five gross materials.

KĀRIKĀ 2.—*Aviśuddhi* means some fault in details of the performance of prohibited slaughter.²⁴ But how, for example, animal sacrifice is at all permitted? The reasons are:—firstly, shortcomings falling under *vidhi* or *nिषेधा* do no harm²⁵; secondly, the minor details help only in the fulfilment of the sacrifice and they have no bearing on the results²⁶; thirdly, *himsā* for man is disallowed and as such it is harmful to man, but it brings no blot on the sacrifice²⁷; fourthly, the prohibition of *himsā* applies to all cases generally, but because *nिषेधा* has not been specially mentioned in the chapter on sacrifices it does harm to man alone.²⁸ The above attempts are to prove sacrificial slaughter as absolutely harmless, but that is shooting above the mark because then it would not remain *aviśuddhi*.

Max Müller has strained the meaning of *śreyān* to show that there is no open hostility against Vedic rituals in the Sāṅkhya.

²⁴ Candrikā.

²⁵ Candrikā.

²⁶ Bālarāma.

²⁷ Kalpataru and Parimala on Bhāmatī.

²⁸ Bālarāma.

Vyakta is generally defined here by Vācaspati as other than *avyakta*. Some restrict it to *mahābhūtas* only. The differences are important because they create confusion later, when the objects of the different means of cognition are discussed. The contention of the Sāṅkhya Kārikā is that everything except Puruṣa and Pradhāna is an object of Pratyakṣa and as such *vyakta*, and, therefore, efforts are made to prove the existence of Pradhāna and Puruṣa by inference, while no efforts are made to prove *mahat*, *ahaṅkāra*, etc. But Vācaspati on Kārikā 6 goes back and makes *vyakta*=earth, etc., which even a mudstained farmer can see and *atīndriya*=*pradhānapuruṣādi* forms the object of inference. Ādi will stand for sense-organs, etc., which have been elsewhere explained by him as the objects of *sāmānyatodṛṣṭa* form of Anumāna. Another explanation of the differences in the meaning of *vyakta* is that at times 8 *prakṛtis*²⁹ are admitted because if the other seven are not pure *prakṛti*, they are at least *prakṛtivikṛtis*. *Vyakta* may have been made equal to earth, etc., because of the real part they play in differentiating knowledge.

KĀRIKĀ 3.—The test of *prakṛtiva* is said to be the capacity to produce another *tattva* and *tattvas* are to be judged by differences in *sthūlatā* and *indriyagrāhyatā*.³⁰ Such a definition was necessary to include *mahat*, *ahaṅkāra* and *tanmātras* and to exclude *indriyas* and *bhūtas*. There was no necessity of accepting the transformations of *bhūtas* as separate *tattvas* because the *bhūtas* by themselves

²⁹ Gītā 7. 4 gives the five *bhūtas* and the threefold *antahkarana* as the eightfold *prakṛti*. It may be a popular or an earlier doctrine.

³⁰ Some wrongly say that the test of *sthūlatā* applies to *mahat*, *ahaṅkāra*, *tanmātrās* and *indriyas* while *indriyagrāhyatā* to *bhūtas*. Their view is based on the invisibility of all else except *bhūtas*. On the other hand both tests should apply to all cases, some being prominent in some cases.

were enough to bring a complete discriminative knowledge.

KĀRIKĀ 4.—Vācaspati has followed the practice of Nyāyasūtras in introducing this Kārikā when he says that general definitions of the means of cognition are given in this and the *viśeṣalakṣaṇa* follows. The procedure is justified there by the text itself, but here the Kārikā is devoted to enumeration only.

Sarvapramāṇasiddhātavāt means that the three enumerated *pramāṇas* include all the remaining means of cognition³¹ that are added by other systems. Nārāyaṇa distorts the sense and interprets—they are the only three means of cognition because they are accepted by all *pramāṭras* and to apply this sense to all cases, he has to make a further supposition that Vaiśekikas are no *pramāṭārah* because they do not admit *śabdapramāṇa*.

A table of the various *pramāṇas* with their respective authors are given below for facility of understanding:—

Name.	Pratyakṣa.	Anumāna.	Śabda.	No pramāṇa.
Upamāna	Vācaspati ...	Vācaspati ... Māṭhara ... Jayamaṅgalā ... Vijñāna ...	Gauḍa Vācaspati Jayamaṅgalā	
Arthāpatti	...	Gauḍa ... Vācaspati ... Jayamaṅgalā		
Abhāva ...	Vācaspati, Vijñāna, Jaya.	Māṭhara ...	Gauḍa	Candrikā
Sambhava	...	Vācaspati ... Māṭhara ... Jayamaṅgalā	Gauḍa. Candrikā	Vācaspati
Aitihya	Māṭhara ...	Gauḍa Candrika Vijñāna	
Pratibhā ...	Jayamaṅgalā ...	Jayamaṅgalā Candrikā ...	Jayamaṅgalā Gauḍa	Jayamaṅgalā

³¹ Vācaspati, Jayamaṅgalā, Māṭhara.

The *pramāṇa* table shows how the definitions of the different *pramāṇas* are not settled and therefore they are classed under different categories by the same commentator or by different commentators taking the shade of meaning that appeals to them.

KĀRIKĀ 5.—Vijñāna questions the possibility of final cognition in *buddhi* for two reasons:—firstly, the expression *pauruṣeyabodha* will become meaningless and secondly, if the reflection alone of *puruṣa* is thought to serve the purpose, it cannot because it is unsubstantial, *tuccha*. The answer is that the image of a lifeless object may not be fit to cognize but the case is different with the image of a *cetana*.

In Guṇaratna's commentary³² there appears a line—“*pratiniyatādhyavasāyah śrotrādisamuttho'dhyakṣam*,” which is in the same metre as the Kārikā. It can be admitted as a reading of the Kārikā only if grave changes are permitted in the other half of the kārikā or if one more kārikā is added, because the other line has no mention of *anumāna*.

Vācaspati turns *lingalingipūrvakam* into faultless definition by repeating *lingi* once more. But Jayamangalā interprets differently altogether—sometimes the inference is *lingapūrvaka* and sometimes *lingipūrvaka*, e.g., inferring cuckoo from her voice, or inferring her voice from the cuckoo.

*Trividha anumāna*³³ has everywhere been made to represent *pūrvavat*, *śeṣavat*, and *sāmānyatodṛṣṭa*; but they have been so variously interpreted that the uniformity remains in name only. They respectively mean—firstly,

³² On Śaddarśanasamuccaya, Bibl. Ed., p. 108.

³³ Sāṅkhya inference was probably from particular to particular on the ground of the seven kinds of relations mentioned in Tātparyatīkā.—Dasgupta, ‘Hist. of Ind. Phil.’ p. 269.

an inference where the *vyāpya* is seen, one by the method of exclusion, and an instance of the inferred of which is not seen; secondly, that it is from cause to effect or of a future happening, that it is from effect to cause or of a past occurrence, and that there is no relation of cause and effect or of present objects; thirdly, *trividha* is made equal to *trirūpa*, i.e., *pakṣadharmatā*, *sapakṣe sattvam* and *vipakṣe sattvam*, which do not remain a classification of inference but denote the three essential conditions of a valid inference; fourthly, they mean *kevalānvayī*, *kevalavayatirekī*, and *anvayavayatirekī*.³⁴ The observations made on the *pramāṇa* table hold good with this analysis also.

Āpta is restricted not only to Vedas but it includes all proper sources and *śruti* means the knowledge produced by sentences, and this sense can be extracted by *lakṣaṇā* or *lakṣitalakṣaṇā*. Firstly *śruti* is to be applied to any ordinary or Vedic sentence and then it is to apply to the knowledge produced by such sentences.

KĀRIKĀ 6.—The majority³⁵ thinks that there was no necessity of giving the objects of *dṛṣṭapramāṇa*, because even an ordinary man knows them and therefore it takes the first half of the kārikā to mean :—invisible objects are known by *sāmānyatodṛṣṭa* type of inference. Candrikā interprets the same line differently—common visible objects are known by *dṛṣṭa* and the invisible by inference. It has defined *sāmānyatodṛṣṭa* as an inference from other than *kāryakāraṇa* relation and that may be some reason for its interpreting the kārikā differently. Vācaspati includes *śeṣavat* with *sāmānyatodṛṣṭa*, but his *sāmānyatodṛṣṭa* alone even is of help in most cases, whereas that of Candrikā cannot infer *Pradhāna* and *Puruṣa*.

³⁴ See for a detailed treatment Prof. Dhruva's paper on 'Trividhamanumānam' in Proceedings and Transactions of the First Oriental Conference, pages 251—280.

³⁵ Vācaspati, Gauḍa, Māṭhara.

Ādi in *prakṛtipuruṣādi* of the Tattvakaumudi can only be interpreted as *tatsamīyoga*³⁶ and not as *mahadādi*,³⁷ otherwise it is redundant.

KĀRIKĀ 7.—A similar kārikā appears in Patañjali's Mahābhāṣya 4. 1. 1,³⁸ and there is every possibility that Iśvarakṛṣṇa borrowed his ideas from that kārikā. The causes given in the Mahābhāṣya are six and all of them except *tamasāvṛtavat* correspond with those given in the Sāṅkhya-Kārikā, and that too may be partially made to agree with *abhibhavat*. The latter has made improvement over the former in number. It is not clear why both separately mention *indriyaghātāt* and *mano'navasthānāt*. Manas is also an *indriya*. Candrikā gives scope to add any number to the eight causes. Māthara adds four and Vācaspati one. Jayamaṅgalā reduces them to four—defects of space, of sense-organs, of objects and of other things. To be more exact they can be reduced to two—defects of the objects and of the sense-organs. *Desadoṣa* and *arthāntaradoṣa* are no more than defects of the objects. The eight causes of the Sāṅkhya-Kārikā can be similarly reduced to two.

KĀRIKĀ 8.—The trouble with Vācaspati, as pointed out above in kārikās 2 and 6, again crops up here. He introduces the kārikā—What then is the reason for the *anupalabdhī* of *pradhāna* and others? Why does he use the plural form in *pradhānādīnām*? Does he want to introduce *mahat*, *ahaṅkāra*, etc., also? But at a later stage he mentions only *Purusa* and *Pradhāna*. These are

³⁶ Vāṁśīdhara.

³⁷ Bālarāma; compare Sāṅkhya-Sūtra 1. 103; also see note on kārikā 2.

³⁸ Dasgupta strangely holds that such an enumeration is not seen in any other system of Indian Philosophy and he therefore suggests that it was the verse of a Sāṅkhya book paraphrased by Iśvarakṛṣṇa.

all irregularities, which may be due to his uncertainty on the point. The plural can be explained if many *pradhānas* are admitted but the *kārikā* never mentions it.

Kārikās 10 and 11 show that *prakrtisarūpam* and *prakrtivirūpam* are common attributes of all *vyakta*, but they can be separately adjusted, the former applying to *prakrtivikṛtis* and the latter to *vikṛtis*.

KĀRIKĀ 9.—Keith³⁹ correctly observes that “the last four arguments which are in effect but two, rest on the perception that in the product the original material is contained, though under change of appearance, and that definite materials give definite and distinct results; the first argument, on the other hand, rests not merely on the fact that the coming into being of any object save from a definite material is not observed, but also on the argument that if a thing does not exist there can be no possibility of its doing anything.” He must have grouped together in the first instance *upādānagrahanāt* and *śaktasya śakyakaranāt*, and in the other *sarvasambhavābhāvāt* and *kāraṇabhbhāvāt*.

Vācaspati and Jayamaṅgalā mean by *grahanāt = sambandhāt*; but Gauda, Candrikā and Māthara take it in the literal sense of procuring.

KĀRIKĀ 10.—The explanation of Vācaspati and Candrikā that *vyakta* is many because *buddhi*, etc., are different with each *Puruṣa*, seems more correct because the opposite suits to one *Pradhāna*, which is common to all *Puruṣas*. Gauda, Māthara and Jayamaṅgalā say because *mahaḍādi* are twenty-three. Vijñāna introduces a far-fetched sense—*vyakta* is many because it is different with different periods of creation, *sarga*. In his opinion, if the word is interpreted otherwise, *Pradhāna* will also become many on account of the three *gunas*. Bālarāma

³⁹ In ‘Sāṅkhya System,’ p. 73.

points out the fallacy—Prakṛti is not divided into separate entities by the *gunas*.

The best explanation of *sāvayavam* is that in which parts and wholes are mixed up.⁴⁰ It is also described as one in which sound, touch, etc., are found.⁴¹ But all *vyakta* has not the qualities of sound, etc. Some take it to mean that which has *gunas*,⁴² others one that has the two aspects of *ādhyātmika* and *bāhya*.⁴³ These explanations also do not cover all the cases of *vyakta*.

Candrikā says that *avyakta* is *niskriya* because it does not suffer *sāntādikriyā*; but then *tanmātrās* will fall out from the manifest, *vyakta*. Jayamaṅgalā says that *kriyā* means *samsaraṇa* and therefore, though Pradhāna creates the universe, yet it does not move because it pervades the three worlds. Vijnāna removes the difficulty by explaining *kriyā* as some definite action like *adhyavasāya*, etc.

Hetumat means one that has a cause.⁴⁴ Māṭhara makes *hetu* = *kāraka* and *jñāpaka*, and according to him Pradhāna is also *kāraka*. But how then will these attributes be restricted to *vyakta* alone?

Āśrita means existence in its cause⁴⁵ or in its parts.⁴⁶ It means *vṛttimat* according to Candrikā. Jayamaṅgalā points to the purpose in separately mentioning *hetumat* and *āśrita* when they approximately mean the same:—the former means that a thing is produced and the latter means that that thing finds shelter in another.

Mahat, etc., also pervade the world. Why are they

⁴⁰ Vācaspati, Gauda.

⁴¹ Gauda, Jayamaṅgalā.

⁴² Candrikā, Māṭhara.

⁴³ Jayamaṅgalā.

⁴⁴ Vācaspati.

⁴⁵ Vācaspati, Aniruddha.

⁴⁶ Vijnāna.

then called *avyāpi*? They pervade only in a secondary sense because they cannot pervade their own cause.⁴⁷

KĀRIKĀ 11.—Bālarāma says that Pradhāna is three *gunas* itself and therefore it cannot be their *ādhāra*. To remove this difficulty he gives two explanations—firstly, that *gunas* here should be taken to mean pleasure, etc., which are the qualities of *sattva* and others; secondly, they should be applied to Pradhāna in the manner ‘trees in a forest.’ Vāmśidhara says that *gunas* are in the form of *kāraṇa* in *mahat*, etc., and in the form of *samūha* in Pradhāna. Do these commentators, then, mean that *mahat*, etc., have something more than the three *gunas* and that *gunas* are not in the form of *kāraṇa* in Pradhāna? These are unnecessary differences pointed out. How the *tanmātrās* will be *triguna*? They do not possess the qualities of pleasure and pain. They are *triguna* because they are the product of *ahankāra* and because they produce the *bhūtas*, both of which possess pleasure, etc.

Sāmānya means common to all like a *mūlyadāsī*.⁴⁸ Candrikā gives an optional interpretation—alike on account of possessing *gunas*. Vācaspati thinks that *sāmānya* and *viṣaya* have been purposely used to refute the principles of Vijnānavādins that objects have no external existence, they are *vijñānamaya*.

Puruṣa is opposite of the qualities mentioned in this and the previous kārikās. But is then Puraṣa one? Gauḍa and Māṭhara say that he is one, which is a contradiction; but Jayamāṅgalā uses a device to avoid it. It interprets *tadviparitah* as different from *vyaktāvyakta* in some qualities only. Vācaspati is clear that one of the differences with Nyāya is that in the Sāṅkhya, the Ātman or Puraṣa does not possess *sukha*, etc. Jayamāṅgalā is

⁴⁷ Vāmśidhara.

⁴⁸ Gauḍa, Māṭhara, Jayamāṅgalā, Candrikā.

wrong when it says that Puruṣa is *cetana* because he experiences pleasure, etc. He is *cetana* because he is all light and because his approximity moves Pradhāna to action.

KĀRIKĀ 12.—Gunas are not the qualities of Nyāya. They are Parārthāḥ, i.e., they execute enjoyment and renunciation for Puruṣa.

Artha means capacity⁴⁹ and therefore, though in the state of dissolution, there is no *prakāśa*, etc., but their possibility persists.⁵⁰

Anyonyāśrayāḥ-guṇāḥ are all-pervading⁵¹ and therefore *āśraya* is used in the restricted sense that one *guṇa* is *āśraya* of the other, with regard to which it acts.⁵² Bālarāma points out the difference between *anyonyāśrayavṛttayah* and *anyonyajananavṛttayah* :—the previous applies to dissimilar effects and the latter to similar effects; but then the statements cannot individually cover the whole field of *vyaktāvyakta*, the former will apply to *vyakta* and the latter to *avyakta*. This is again in conflict with the meaning of Candrikā, according to which ‘ca’ shows that all the processes go on simultaneously and not partially. Vācaspati and Candrikākāra have taken *anyonya* and *vṛtti* with each of the remaining words of the compound: but Gauda and Māthara take *vṛtti* separately to mean one additional process.

The *guṇas* may be regarded as representing the different stages of evolution of any particular product.

⁴⁹ Gauda.

⁵⁰ Bālarāma.

⁵¹ According to Bhāṣya on 1.127, each *guṇa* cannot be *vibhu*, e.g., *sattva* represents many *sattva* entities classed under one group; otherwise, firstly there cannot be incalculable differences in the effects and secondly *sādharmyam* in the next sūtra will be meaningless.

⁵² Vācaspati, Māthara.

Sattva signifies the pure and perfect stage that is to be reached, *tamas* the obstacles or the meanest stage, and *rajas* the force by which obstacles are overcome and the products become more defined and definite.

KĀRIKĀ 13.—Gauda and Māṭhara give some examples of the effects of ' *cala*' quality in *rajas* :—a bull becomes intoxicated, or it makes one quarrelsome, or one wishes to go to a village, or one begins to love some woman, etc.

Vācaspati has given the example of *vātapittaslesha* in addition to that of a lamp in the Kārikā to elucidate the harmonious working of opposite qualities and Bālārāma thinks that the additional example is more appropriate because they are more opposed to one another than oil, wick and flame.

Vācaspati says that like *sukhaduhkhamohāḥ*, *sukha-prakāśalaghavāḥ* do not create more varieties. This statement is doubtful and groundless except that the latter represent the different phases of the one quality pleasure and not different *gunas*. How do the conflicting *gunas* combine? Yogabhāṣya explains that *atīśayas* only are in conflict but they combine with *sāmānyas*. Why then do they not flood the perceiver all at once? The answer is that though the conflicting *gunas* exist everywhere yet only one at a time comes to prominence in accordance with the corresponding environments, *nimittas*. But *dharma-dyāḥ* also exist everywhere and at all times without distinction. No, they cannot, because they are momentary.

KĀRIKĀ 14.—The predominant opinion is that the first half of the kārikā is to prove that Pradhāna is indiscriminative, etc., which is clear in the case of *vyakta*. Vācaspati takes the other option also in which both *vyakta* and *avyakta* are to be proved indiscriminative, etc., by the *avīta* form of reasoning. Gauda accepts the optional meaning of Vācaspati. Candrikā holds it proved that Prakṛti is indiscriminative, etc., and proceeds to prove the

same in *mahadādi*. Introducing the second half of the kārikā, it says that if *mahat*, etc., had no prime cause, there would be no liberation because *mahat*, etc., would become ever-existing.

KĀRIKĀ 15.—*Samanvayāt* means similarity in the different evolutes.⁵³ Gauda gives a loose meaning—as one infers from the sight of a Brahmacārī that his parents must be Brāhmaṇas. The explanation of Vijñāna,⁵⁴ does not directly fit in the kārikā.⁵⁵ He says that the emaciated *buddhi*, etc., on account of fasting, again grow strong after taking food; this shows that they are effects. But the kārikā is about the existence of *avyakta*.

KĀRIKĀ 16.—The second part of the first half of the kārikā has been interpreted differently. Vācaspati keeps *trigunataḥ* to indicate the activity of Prakṛti in the state of dissolution which is of the type of similar effects⁵⁶ and *samudayāt* is to denote its activity in the state of creation which is in the form of prominence and subordination of *guṇas*; but Gauda, Candrikā and Māthara apply both the words to the movement of Prakṛti in the state of creation only. According to Gauda, the former is used to express that the three *guṇas* in Prakṛti are utilized in the effects; and according to Candrikā, it is used to account for the manifoldness of effects.

To refute the objections that there would be always movement or no movement, the Sāṅkhya-Sūtra—‘*sāmyavaisamyābh�ām kāryadvayam*,’ and the Pañcaśikha-Sūtra—‘*ubhayathā cāsyā pravṛttih pradhānavyavahāram labhate nānyathā*’ are worth remembering.

⁵³ Vācaspati, Candrikā.

⁵⁴ Vijñāna stands for Vijñānabhikṣu.

⁵⁵ On Sāṅkhya-Sūtra 1. 131.

⁵⁶ Sarala Sāṅkhya denies (similar) effects in the state of equilibrium.

KĀRIKĀ 17.—It is strange coincidence that the existence of Puruṣa, Prakṛti, and *satkāryatā* have been all proved by five arguments.

Aniruddha on sūtra 1. 140 has said, or *dravakathinatā* is *sam̄hatatvam*; but this is not proper because it does not reflect on the necessity of accepting Puruṣa; the word must carry the sense of enjoyability in some aspect to need someone else to enjoy.

Puruṣa is *adhiṣṭhātā* only by nearness to Pradhāna and its effects,⁵⁷ or he dominates as a king does and therefore his superintendence should not be objected on the ground that he has no attributes or that he has no activity.

KĀRIKĀ 18.—Order in birth is ordinarily meant to convey that when one is born, everybody is not born and order in death means that when one is dead, everybody is not dead. But Māthara gives one more meaning to the expressions:—some are born low and some high; accordingly there is order in death when we say that my brother is dead or my father is dead.⁵⁸

Puruṣas must be many.⁵⁹ One Puruṣa cannot be divided into many by mere adjuncts, *upādhis*, because—(1) then hands and feet will also represent separate Puruṣas, (2) the distinction between the released and the bound will disappear because the portion of space that falls vacant by the ruin of a pot can be filled in by procuring another pot.

⁵⁷ See Sāṅkhya-Sūtra 1. 96.

⁵⁸ Radhakrishnan objects to the argument because then birth and death will apply to the eternal Puruṣa who is *asaṅga*.

⁵⁹ The plurality is not so much a reaction against some philosophical principle as a survival of primitive animism.—Carpenter, 'Theism in Medieval Ind.' Oldenberg suggests the appropriateness of the grammatical interpretation of Puruṣa—dwells in the body (locative), which it can leave.

KĀRIKĀ 19.—Puruṣa is *draṣṭā* because he is *cetana*,⁶⁰ or because he is *madhyastha*.⁶¹ He is *akartā* because he is *vivekī* and *aprasavadharmī*,⁶² or because he is the latter⁶³ or because he is *madhyastha*.⁶⁴ This shows how differently the attributes of Puraṣa in this kārikā are derived from the attributes given in kārikā 11. Vijñāna justifies the mention of two like words, *sāksitva* and *drasṭrītva* by pointing an imaginary difference that Puraṣa is *sāksī* with reference to *buddhi* and *draṣṭā* in relation to others.⁶⁵

KĀRIKĀ 21.—The prime cause of creation is the nature of Pradhāna to move for the enjoyment and release of Puraṣa and not their union alone as emphasized in kārikā 66 also. This to some extent reduces the force of the objection generally raised against the example of the lame and the blind—Prakṛti is *jada* and Puraṣa is *akartā* and therefore, they cannot express their intention to combine like the lame and the blind.

Vācaspati takes *darśanārtham* with *pradhānasya* and *kaivalyārtham* with *purusasya*. Gauḍa and Māṭhara take otherwise. This makes a paltry difference in their interpretation, because both processes proceed from Pradhāna in the interest of Puraṣa.

KĀRIKĀ 22.—Vācaspati, Māṭhara, Jayamangalā and Candrikā hold that one *tanmātrā* combines with one, two, three, or four to produce the more complex *bhūtas* with that number of qualities. Gauḍa says that they can singly produce the *bhūtas*. As regards they themselves, according to Vyāsabhāṣya, *tanmātrā* of sound accompanied by

⁶⁰ Vācaspati, Jayamangalā.

⁶¹ Gauḍa.

⁶² Vācaspati.

⁶³ Jayamangalā.

⁶⁴ Gauḍa.

⁶⁵ On Sūtra 1. 161.

aḥankāra produces the *tanmātrā* of touch and so on. A meaningless question is raised by *Vijnāna*.—how then ether gross and fine is to be contrasted and answered that gross ether takes the help of *bhūtādi*. The difference is there because gross ether is a further stage in evolution.

A fictitious etymology is given to *aḥankāra*—when it is said that the word was coined by taking the first and the last letter from the list of 64 letters to represent all objects that can be denoted by the combinations of those letters.

KĀRIKĀ 23.—The determination of objects by *buddhi* is compared to the forthcoming sprout in a seed by *Gauḍa*, but this has no meaning.

Gauḍa has divided knowledge, *jñāna*, into external, *bāhya*, and internal, *ābhyantra*. The external knowledge gives worldly pleasures and the internal causes liberation. There is no room for such classification because *jñāna* in the kārikā means nothing else than the final knowledge of the distinction of *Pradhāna* and *Puruṣa*. *Vimocayatyekarūpena* and *siddheḥ purvo'ṅkuśastrividhah* in kārikās 63 and 51 respectively establish the same meaning. *Gauḍa* has continued the craze for division in *vairāgya* also and he has become ridiculous in explaining internal *vairāgya*—*Pradhāna* also is here like dream or magic representation.⁶⁶ *Vairāgya* is only helpful in true knowledge which is differentiation of attributeless soul from *Pradhāna* and its creation. These must not be any more owned by *Puruṣa*.

Garimā is one of the *aiśvaryas* according to *Vācaspati*. *Gauḍa*, and *Jayamaṅgalā* place *kāmāvasāyitvam* in its place; and *Māṭhara* mentions both, raising the number to nine. *Bālarāma*'s edition does not give *garimā* in the text of the *Tattvakaumudī*, while *Vāṁśidhara*'s edition

⁶⁶ Contrast *Sāṅkhyā-Sūtra* 1. 45.

counts *kāmāvasāyitvam* as the eighth variety instead of *īśitva*.

KĀRIKĀ 25.—Vijnāna. is of opinion that only *manas* emanates from the *sāttvikāhaṅkāra*. This sense cannot be extracted from the kārikā without grave distortions. Rajoguṇa is not considered to have separate effects. It only makes possible the working of the other two *gunas* by imparting movement to them. The masculine in *ekādaśakah* also cannot point to *manas* alone. The sūtra—*sāttvikamekādaśakam*, relevant to the matter in hand, is confusing, but *ekādaśakam* is fixed down to mean eleven in a later sūtra—*karmendriyabuddhīndriyairāntaramekādaśakam*. There is no difficulty in deriving *karmendriyas* from *vaikārika*, because if that question is raised, the division of Vijnāna. also cannot stand on its merits—how can *buddhīndriyas* be derived from *taijasa*. Balarāma divides the *sattva* into *utkata*, *madhyama* and *nikṛṣṭa* to account for *manas*, *buddhīndriyas* and *karmendriyas* respectively. The last support is awkwardly removed by Vāṁśīdhara, who maintains that organs only in a body⁶⁷ have been called *taijasa* in Smṛtis and not individual organs.

Vijnāna. thinks that separation of *aṅkāra* and evolution of *tanmātrās* take place in *mahat* and this has been brought in line with the kārikā conception by Dasgupta by using the Yoga expression, *samsṛṣṭāḥ viviccyante*—the two conceptions take the two aspects of the matter in hand.

KĀRIKĀ 26.—*Indrasyātmanścihnatvam* is not a satisfactory and exclusive definition of *indriyāni*⁶⁸ because it

⁶⁷ While Sāṅkhya Saṅgraha says that the godlike *indriyas* of *svayambhu* are produced from *vaikārika* and individual organs from *taijasa*.

⁶⁸ Vācaspati.

applies to other *tattvas* than *indriyas* also. Candrikā and Māṭhara give another meaning—in *padena viśayāḥ tān prati dravanti*. This excludes *manas*.

KĀRIKĀ 27.—The second half of the kārikā should refer to the eleven *indriyas*; *nānātvam* should stand for *vṛttiniyama* and *bāhyabhedāḥ* for *deśaniyama*,⁶⁹ i.e., how the organs are differently situated in the body. But Vācaspati and Candrikā take *bāhyabhedāḥ* as an example showing that there is similar multiplicity in *tanmātrās* that are products of one *bhūtādi*. Candrikā and Māṭhara give *grāhyabhedācca* as an optional reading and then it becomes one more argument for numerosness of organs besides *guṇaparināmaviśeṣāt*. Vāṁśīdhara has expressed a foreign idea that *manas* also becomes many as it comes in contact with the different *indriyas*. The first half of the kārikā is not well-arranged and well-worded; at the first reading *saṅkalpakam* and *indriyam* seem to express the meaning of *ubhayātmakam*, but then *sādharmyāt* is left alone and therefore at second thought the line has to be differently construed.

KĀRIKĀ 28.—The word *mātra* stands to show that *buddhīndriyas* have only indeterminate knowledge,⁷⁰ while Vijnāna thinks that they have determinate knowledge, but that will relegate *manas* to a very subordinate position remaining only as a seat of desire, doubt and imagination, and only the previous kārikā has called *manas* as *saṅkalpakam*. Gauda and Māṭhara think that *mātra* is to indicate that one sense-organ has one's own field and that it does not encroach over another's, e.g., eyes only perceive objects and do not taste. Candrikā thinks it to limit the sense to seeing, hearing, etc., and to demark from fetching, etc., which are the functions of *karmendriyas*.

⁶⁹ Jayamangalā.

⁷⁰ Compare Kumārila and Prāśastapāda.

Bālaraṁa thinks that the sense of *vṛttayah* has to be strained to apply to *karmendriyas*.

KĀRIKĀ 29.—Gauda is preferable because he gives a homogeneous division. He takes the previous kārikā and this together, and transfers both uncommon and common *vṛttis* to *bāhyendriyas* and *antahkarana* together.⁷¹ The objection that *prāṇas* continue to function even in deep sleep when *indriyas* disappear remains to be answered. Nobody advocates the disappearance of *indriyas* in deep sleep, they only stop functioning.⁷² The consensus of opinion is with Gauda. Sāṅkhya-Sūtra 5. 113 is of opinion that *prāṇas* are from *indriyaśakti* and the *Pāñcarātras* hold the *rajas* element in *mahat* as *prāṇa*. Each of the five *prāṇas* is not always similarly located by the different commentators. Their functions are also differently given, and Māṭhara seems to connect them with the three *gunas*.

KĀRIKĀ 30.—*Catusṭaya* according to Gauda means *buddhi*, *ahaṅkāra*, *manas* and some one *indriya*, but then it will exclude the case say that of *dīrghaśaṣkuli*, in which two or more sense-organs⁷³ work simultaneously. The latter case is also possible because the majority of Sāṅkhya authors admit *manas* to be of *madhyama parimāṇa*. The objection that such *manas* will be transitory cannot arise in the Sāṅkhya.

'Tat' does stand for *drṣṭa*, but that meaning cannot be naturally extracted from the construction in the kārikā. Gauda holds only *kramaśāḥ jñānam* in *adrṣṭa* which seems arbitrary. If he had to make an arbitrary supposition in spite of what the kārikā purports, he should have done

⁷¹ When the uncommon *vṛtti* of both *antahkarana* and *indriyas* has been related, why should common *vṛtti* apply to the former only?—Vaidikī Vṛtti on 2. 31.

⁷² Vaidikī Vṛtti on Sāṅkhya-Sūtra 2. 31.

⁷³ Sūtra 2. 31 mentions *indriyas* only.

otherwise, because the circumstances under which *kramaśah jñāna* is possible are as in dim light according to Vācaspati and Candrikā, or when at a distance according to Māthara and Gauḍa, which means that external limiting factors account for *kramaśah jñāna*. They are absent in *adrṣṭa*. To be consistent with the kārikā *kramaśah jñāna* in *adrṣṭa* may be explained by the mental state that at times hastens and at times lingers the process.

KĀRIKĀ 31.—Gauḍa incorrectly applies the kārikā only to the threefold *antahkaraṇa*. Candrikā applies the observations of the previous kārikā—when there is no obstruction like that of doubt, etc., the action is simultaneous otherwise it is *kramaśah*, and *svām svām pratipadyante* is to emphasize that even in simultaneous action each organ keeps to its function.

Māthara says that the *karanas* proceed on getting the signal from *buddhi* but to be more correct the process in the case of perception, etc., begins with the *bāhyendriyas* and in the case of speaking, etc., it begins with *buddhi* downwards.

KĀRIKĀ 32.—The functions have been differently attributed and their results differently enumerated. The functions are so classified :—

Name.	Gauḍa.	Māthara.	Vācaspati, Candrikā
Āharanam ...	Karmendriyas ...	Indriyas ...	Karmendriya.
Dhāraṇam ...	"	Ahaṅkāra ...	Threefold antahkarana.
Prakaśakaranaṁ	Buddhīndriyas	Buddhi ...	Buddhīndriya.

The explanation of Gauḍa ignores *antahkaraṇa*. According to Vācaspati, *antahkaraṇa* preserves life by means of *prāṇas*.⁷⁴ Gauḍa, Māthara, and Jayamangalā

⁷⁴ This statement cannot stand according to Gauḍa, etc.; see notes on kārikā 29.

do not take ten with *āhāryam*, *dhāryam* and *prakāśyam* separately, and, therefore, the ten effects according to them are the objects of *buddhīndriyas* and *karmendriyas*—*śabda*, etc., and *vacana*, etc. Vācaspati and Candrikā take ten with each and their ten *āhāryas* are *divyādīvya vacana*, etc.; ten *dhāryas* are *prāṇādilakṣaṇayā vṛtyā śarīram*, tacca *pārthivādi pāñcabhautikam*, *śabdādināṁ pañcānāṁ samūhaḥ prthivī*, *teṣām divyādīvyatayā*, and the same are ten *prakāśyas*. Mystery attaches to the meaning of this kārikā even after the extensive explanation. The kāryas are not clear, but the interpretation of Vācaspati and Candrikā has the advantage over others because the former have been able to justify the occurrence of *daśadhā* with each.

Vidha is used according to Vāṁśīdhara to show that though the *karaṇas* are numberless on account of numberless Puruṣas yet they can be grouped under 13 heads.

KĀRIKĀ 33.—Gauda strangely joins *sāmpratakālam* with *viśayākhyam*. Vācaspati takes it to mean also those periods of past and future that are near the present so as to avoid *avyāpti* in the *vṛtti* of *vāk*. How can *karmendriyas* be *dvāri* to *antahkarana*? Candrikā answers—that they can also be of use in the function of *antahkarana* through the *buddhīndriyas*.

KĀRIKĀ 34.—Why *tanmātrās* are *aviśeṣa*? The different opinions are—(1) *mātra* only excludes the specialties of *śānta*, etc., and does not exclude the qualities that have come from previous stages⁷⁵; (2) they have not been called *viśeṣa* like the *indriyas*, though both are produced from *ahanikāra* because they further produce *bhūtas*⁷⁶; (3) they are pleasure-giving to the gods, *sattva* is predominant in them and, therefore, they are called *aviśeṣāḥ*.⁷⁷

⁷⁵ Vācaspati; Yogavārttika; justified by kārikā 38.

⁷⁶ Yogavārttika.

⁷⁷ Māthara; Gauda on kārikā 38.

KĀRIKĀ 35.—*Sarvam* has been interpreted by Gaudā and Māthara to mean past, present and future objects, but the kārikā can only be indirectly applied to past and future objects because in their cognition, only the deposited results of the use of *bāhyendriyas* at some previous occasion are utilized; and, therefore, there is no sense in calling *antahkarana dvāri* in such *adr̥ṣṭa* cognitions.

KĀRIKĀ 36.—*Pradīpakalpāḥ* means that which illuminates the objects like a lamp and then it can be construed with *prakāśya*; but Vācaspati interprets it as wick, oil and flame to elucidate *parasparavilakṣaṇāḥ*.

KĀRIKĀ 37.—The kārikā is to prove the supreme position that *buddhi* occupies. Vācaspati takes the two halves of the kārikā as two arguments but Gaudā and Māthara introduce the first and second halves with *yasmāt* and *tasmāt*, respectively, i.e., introduce causal relation between the two statements. Candrikā introduces the kārikā thus—*buddhi* though supreme does not work for her sake, but acts for the sake of Puruṣa.

Viśinaṣṭi pradhānapuruṣāntaram is interpreted by Vācaspati as ‘makes known the already existing minute difference between Pradhāna and Puruṣa.’

KĀRIKĀ 38.—Vācaspati and Candrikā say that one ‘*ca*’ is to denote *hetu* and the other to denote *samuuccaya*. This is superfluous but it is characteristic of Indian commentators who try to attach significance to every word in the text.

Vāṁśīdhara illustrates pleasure, etc., by the example—as the touch in air, fire and poison, but there cannot be separate examples for individual *guṇas*. Each object represents all the three *guṇas* and it becomes pleasurable, painful or indifferent as they come to prominence.

KĀRIKĀ 39.—Candrikā ingeniously makes the statement in the kārikā—*mātāpitṛjāḥ nivartante*, to include

prabhūtah also and he says that the former have been specially mentioned to show the *gaṇatva* of *jīva*.

KĀRIKĀ 40.—The kārikā uses such attributes as could have been differently interpreted but there is not much difference amongst the commentators which may be due to a continuous tradition of meaning.

Niyatam means which persists from the first creation to the time of great dissolution⁷⁸ or which persists as long as true knowledge does not arise.⁷⁹ But Candrikā interprets it as different for every soul.

Gauḍa does not include *bāhyendriyas* in the *sūkṣmaśarīra*. Sāṅkhya-Sūtra enumerates *buddhindriya*, *prāṇas*, *buddhi* and *manas*. A modern writer⁸⁰ has suggested that the non-inclusion at times of *ahaṅkāra* in the constituents is because in the beginning there was only one *sūkṣmaśarīra*.⁸¹ This would be at once contradicted by Vācaspati who says that in the beginning, Pradhāna created separate *liṅgas* for each Puruṣa. Others say that *ahaṅkāra* is not mentioned because it is included in *buddhi*. Vijñāna. on sūtra 3. 11 says that there are three types of bodies and they are sometimes said to be two because *liṅgaśarīra* and *adhisṭhānaśarīra* are confused into one for two reasons—firstly, because one depends on the other, and, secondly, because they are subtle.

KĀRIKĀ 41.—The explanation of Gauḍa seems more appropriate because he means the subtle body from *liṅga*. *Liṅga* has been used in the previous and the next kārikās to mean *sūkṣmaśarīra* and, therefore, that is the meaning that spontaneously strikes the reader. It has been used in kārikā 10 for *buddhyādayaḥ* and Vācaspati takes that

⁷⁸ Vācaspati.

⁷⁹ Gauḍa, Jayamaṅgalā.

⁸⁰ Ghosh: ‘Sāṅkhya System and Modern Thought.’

⁸¹ Hiranyagarbhopādhirūpa, Bhāṣya on 3. 10.

sense and makes *viśeṣaiḥ* = *sūkṣmaīḥ* *śarīraīḥ* on the basis of kārikā 39, but this means a repetition of *buddhyādayāḥ* except the *mahābhūtas*, which are absent in *sūkṣmaśarīra*. *Līṅga* in kārikā 10 qualifies and covers the whole field of *vyakta*. Gauda has been wise in making *nirāśrayam*³² qualify *līṅgam* so that *tanmātrāḥ* are excluded, and he joins *vināviśeṣaiḥ* and takes out of it not *viśeṣaiḥ* like Vācaspati, Māṭhara and Candrikā, but *aviśeṣaiḥ* which has been used in kārikā 38 for *tanmātrāḥ*. Māṭhara also takes out *aviśeṣaiḥ* but interprets it like Vācaspati—*tanmātrāṇi tairārabdhāṁ sūkṣmaśarīram*. Candrikā adopts the meaning of Vācaspati, and as an optional meaning gives that *līṅga* = *samudayātmakāṁ līṅga śarīram* cannot exist without the support of gross body.

KĀRIKĀ 42.—*Prasaṅgena* has been rendered by *prasakti*³³ but it can be better rendered—‘on account of.’

Vibhutva has been correctly rendered by Vācaspati and Candrikā as *vaiśvarūpyāt*; but Gauda and Māṭhara render it—‘as a king is supreme in his dominions.’

KĀRIKĀ 43.—The kārikā has been made ambiguous by the commentators. Vācaspati thinks that this kārikā gives the division in *nimitta* and *naimittika*, while the next gives as to what *naimittikas* proceed from what *nimittas*. In the previous kārikā all had agreed to render *naimittika* as *sthūladehādi* and the other as *dharmādi*. But here *vaikṛtāḥ* is equated to *naimittikāḥ* which are *dharmādyāḥ* according to kārikā. Jayamaṅgalā introduces kārikā 46—the 16 *nimittanaimittikas* related before are here briefly stated as of four kinds. Vācaspati, Candrikā and Jayamaṅgalā divide the *bhāvas* only in two types but Māṭhara and Gauda divide them in three—(1) *sāṃśid-*

³² Vācaspati makes it modify *na tiṣṭhati*.

³³ Vācaspati.

dhikāḥ as of Kapila; (2) *prākṛtikāḥ* as of the sons of Brahman; (3) *vaikṛtikāḥ* as ours.

To Vācaspati and Gauda, *karanya* = *buddhi* but to Māṭhara it is equal to *buddhikarmāntahkaraṇabhedāḥ trayodaśa*. Are *prākṛtikabhāvāḥ* limited to *karaṇas* only? The question rises in reading Jayamaṅgalā and Vamśīdhara. If *prākṛtikabhāvāḥ* were only in Kapila, the question is decided, otherwise both types of *bhāvāḥ* can have their *āśraya* in *karaṇa* and *kārya*.

An odd opinion appears in Candrikā—*prākṛtikāḥ* are those that stay as long as the thing itself, e.g., *ahaṅkāra*, etc., from *mahat*, and *vaikṛtikāḥ* that stay at fits and intervals.

KĀRIKĀ 44.—The use of *dakṣinābandha* as one of the *bandhāḥ* has been used as evidence of the jealousy of the Sāṅkhya towards Vedic rituals. *Prakṛtibandha* is when one worships *Prakṛti* thinking it *Puruṣa*.⁸⁴ Māṭhara includes in it the eight *prakṛtis*. *Vaikṛtikāḥ* is when one worships *bhūtendriyāḥaṅkārabuddhīḥ* taking them for *Puruṣa*,⁸⁵ Māṭhara considers it due to *aiśvaryā* or due to believing *brahmādīsthāna* as the final goal. *Adhastāt* is *sutalādiloka*⁸⁶ or *tiryagyoni*.⁸⁷

Dharma is not an important conception in the Sāṅkhya and therefore it is loosely interpreted.

KĀRIKĀ 45.—*Prakṛti* is explained as *mahaḍahaṅkāra-bhūtendriyāṇi* by Vācaspati and *bhūtendriyāṇi* are replaced by *tanmātrāṇi* by Gauda, Māṭhara and Jayamaṅgalā. It is strange how *bhūtendriyāṇi* have been included in *Prakṛti*. Why should Vācaspati differ from

⁸⁴ Vācaspati, Jayamaṅgalā; why should Vācaspati not equate this *bandha* with his *aṣṭavidhāvidyā* in kārikā 48?

⁸⁵ Vācaspati.

⁸⁶ Vācaspati, Candrikā.

⁸⁷ Jayamaṅgalā, Gauda, Māṭhara.

what he has said in the previous kārikā about *prakṛti-bandha*? All have qualified *vairāgya* in the kārikā by *jñānaśūnya*, and that is necessary because *vairāgya* coupled with *jñāna* alone is a means to liberation as mentioned in Sāṅkhya-Sūtra.

KĀRIKĀ 46.—Keith⁸⁸ thinks that the kārikās 46 to 51 are possibly later interpolations. The reason given is that they uselessly reclassify the *pratyayasarga* in a different manner from what has been done in the previous two kārikās and kārikā 23. The argument is not correct because there appear other such unimportant kārikās in the body of the work and their presence should be accounted for by the further *viveka*, distinctive knowledge, they give. The kārikās, if this procedure is admitted, will also lose their importance of determining the character of the Sastitantra. Gauda and Māthara have become crude in trying to become simple and illustrative about the divisions :—*aśakti*, as after properly seeing the post, one is not able to remove doubt; *tuṣṭi*, he is not anxious to know the post because of what use is that knowledge to him; *siddhi*, he sees the creeper that runs along the post and he has the knowledge of the post.

Siddhi alone is regarded capable of bringing salvation, and Gauda says that *tuṣṭi* is the *tāmasa* knowledge and *siddhi* the *sāttvika* knowledge of persons on the path of liberation.

KĀRIKĀ 47.—How can *asmitā*, *rāga*, *dveṣa* and *abhiniveśa* be *viparyayas*? The answer is that though they do not proceed from *viparyaya* still they are of the nature of *viparyaya*. Candrikā says that the propriety of saying *karanavaikalyāt* is in debarring many more *aśaktis* caused by diseases, and in limiting the number to twenty-eight.

⁸⁸ In 'The Sāṅkhya System,' p. 85.

KĀRIKĀ 48.—Vācaspati suggests as if, leaving *avidyā*, the remaining *viparyayas* affect only *devāḥ*, gods. It seems that *avidyā* alone matters for common people; and the rest, because they include *divyādivya* and *anīmādayaḥ*, affect yogins.

KĀRIKĀ 49—*Indriyavadha* cannot be *pratyayasarga*; it may be partially *ahaṅkārasarga*; and therefore it can be called *pratyayasarga* only indirectly because it proceeds from *ahaṅkāra* which is in *pratyayasarga*.⁸⁹

KĀRIKĀ 50.—Vācaspati and Māthara say that *viṣayas* are five and *uparamas* are also five. If the similarity is only in number, the expression is harmless but if it denotes causal relation, the statement cannot be justified because each *uparama* does not proceed from one *viṣaya* separately but it proceeds from the collective restraint of the five objects. Candrikā and Gauḍa avoid such ambiguity. Rāmāvatāra Śarmā realized the difficulty and, therefore, he divided *uparamas* into two kinds—firstly, the five *vairāgyas* arising from seeing the futility of the five enjoyable objects, and, secondly, from seeing the dark side of *arjanarakṣaṇa*, etc.

*Prakṛtyākhya*⁹⁰ is when one feels that the realization of true knowledge is a natural phase of Prakṛti and therefore it needs no meditation, etc.,⁹¹ or when one knows the Prakṛti and its *sagunānirgunaṭva* and its similar products and is satisfied with that,⁹² or when one knows the Prakṛti but not its *sagunānirgunaṭva*, etc.⁹³ Candrikā names *megha*, the *adhyātmika tuṣṭi* that Vacaspati calls *ogha*.

⁸⁹ Jayamangalā.

⁹⁰ These four are differently given in Sāṅkhya Saṅgraha as *paramātmatva* in Prakṛti, *buddhi*, *ahaṅkāra* and *tanmātrās*.

⁹¹ Vācaspati, Candrikā, Jayamangalā.

⁹² Gauḍa.

⁹³ Māthara.

Rāmāvatāra Śarmā thinks that *salila* is actually *śarīra* and it has been formed by suffixing *iran* to the root *sar*. *R* has been replaced by *I* because they are the same. *Ogha* and *vṛṣṭi* have been so called because they resemble rain in uncertainty.

The names of the five *bāhyāḥ tuṣṭayāḥ* are variously given :—*pāram*, *supāram*, *pārāpāram*, *anuttamāmbhaḥ*, *uttamāmbhaḥ* (Vācaspati, Candrikā), *sutamah*, *pāram*, *sunetram*, *nārikam*, *anuttamāmbhasikam* (Gauda), *tāram*, *sutāram*, *sunetram*, *sumarīcam*, *uttamāmbhasikam* (Māthara), *sutāram*, *supāram*, , *anuttamāmbham*, *uttamāmbham* (Jayamaṅgalā). This shows the uncertainty about their names. Rāmāvatāra Śarmā has forced some interpretation into the names given by Vācaspati—the first is called *pāra* because it carries one beyond the pains of earning; the second is called *supāra* because one may be tempted to enjoy even when one has realized the troubles of earning, but it is practically impossible for one to think of enjoying when one sees the troubles of protecting; the third is called *pārāvāra* because one who observes depreciation is at times tempted, and at others not tempted; the fourth is *anuttamāmbhaḥ* because it arises from a selfish desire, i.e., on account of the fear of diseases in enjoyment; and the fifth is *uttamāmbhaḥ* because it is prompted by mercy.

KĀRIKĀ 51.—Vācaspati has explained the five *siddhis* in two ways and the other commentators have adhered to one method or the other, or they have drawn material from both the sets. The first meaning given by Vācaspati looks artificial. He has distorted the meanings to class the eight *siddhis* into *hetu*, *hetuhetumati* and *hetumati*. He could where such was wanting. The other meaning sounds more not have remained satisfied without introducing regularity correct and natural because in it there is neither the

necessity of twisting the sense of words, nor of changing their order. This meaning has been picked up by Jayamangalā and there is every possibility that Vācaspati borrowed it from Jayamangalā, or that there were two concurrent traditions.

Vācaspati thinks that *aṅkuśa* is used in the sense of distractive, *nivāraka*, and therefore, for him the threefold *aṅkuśa* is *viparyaya*, *aśakti* and *tuṣṭi*. Vijñāna says that it means attractive, *ākarṣaka*, and therefore the threefold *aṅkuśa* is *ūha*, *śabda* and *adhyayana*, *suhṛtprāpti* and *dāna* being of lesser importance. The objection that *tuṣṭi* and *atuṣṭi* cannot be both averse to *siddhi* is answered thus—that they represent two independent *dharma*s and not the absence of each other. *Uha*, etc., are themselves *siddhis* and therefore they should not be counted as *aṅkuśa*. Vācaspati is therefore correct and the confusion is created because *aṅkuśa* bears a double meaning.

The *atuṣṭis* and *asiddhis* can be settled with great difficulty. Gauḍa and Māthara have given them opposite names because they represent opposite ideas—*anambhāḥ*, *asalilāḥ*, etc.; but Jayamangalā gives to the *asiddhis* the names *moṣamuṣṇamānoramityādyāḥ*.

KĀRIKĀ 52.—Naturally *bhāva* means *pratyayasarga* and *liṅga*, *sūkṣmaśarīra*. They have been used in previous kārikās in this sense but in this kārikā their sense has been slightly strained. Vācaspati makes *liṅga* = word, etc., and the twofold body, and *bhāva* = the thirteen *karaṇas* which are not possible without dharma, etc., because these two *sargas* are essential for the enjoyment and release of Puruṣa. According to Gauḍa, *liṅga* is *tanmātrasarga* up to the fourteen *bhūtas*; according to Candrikā it is the non-visible group of *mahat*, etc., and according to Māthara, it is *sūkṣmaśarīra* and the thirteen *karaṇas*. Vijñāna regards the two kinds more closely to a creation of intellect,

regarding *linga* as *buddhi* itself and *bhāva* as its conditions.

KĀRIKĀ 53.—There is no harm in calling the *bhautikasarga* as a phase of the *lingasarga*; Jayamaṅgalā and Māṭhara hint it as a third *sarga*. Aniruddha on sūtra 3. 46 divides the whole creation into six—*sura*, *asura*, *nara*, *preta*, *nāraka* and *tiryak* and *sthāvara* are included into *nāraka*. Candrikā has two alternative devices for the case of pot, etc.—(1) they are not included because *bhautika* means bodily, or (2) they are to be included in *sthāvara*. The latter view is held by Vācaspati.

KĀRIKĀ 55.—*Lingasyāvinivṛtteḥ* is dissolved in two ways by Vācaspati—(1) *lingasya avinivṛtteḥ*, (2) *lingasya āvinivṛtteḥ*. The latter device is resorted to by Gauḍa, Candrikā, Māṭhara, and Jayamaṅgalā. Māṭhara reads *samāsena* = *sāṅksepena* in the kārikā instead of *svabhāvena*. Jayamaṅgalā thinks that *jārā* and *māraṇa* include *garbha* and *janma* also. *Linga* should mean *sūkṣmaśarīra* because that will suit the belief that *liṅga* disappears after *viveka* only.

KĀRIKĀ 56.—Māṭhara and Gauḍa have given a worldly example of *svārtha* :—as one does his friend's work as if it is for himself. Candrikā extracts another shade of meaning. It says—as others work for their own interest, so the movement of Prakṛti for the sake of Puruṣa is also possible because movement requires some sort of purpose. *Vimokṣārtham* according to Vācaspati is to indicate that the ever-active Prakṛti does stop for some particular Puruṣa, who has gained knowledge and according to Candrikā it is to indicate that the world may cease for one but continue for the rest.

KĀRIKĀ 57.—Gauḍa, Māṭhara and Jayamaṅgalā apply the example to *nivṛtti* also—as the cow stops giving milk when the calf is nourished! Rāmāvatāra Śarmā says

that a cow does not give milk as long as it does not give birth to a calf, though it is taking its regular food; this is the force to *vatsavivṛddhaye*.

KĀRİKĀ 59.—*Prakāśya* cannot mean after giving direct knowledge of Pradhāna because it is always to be inferred. Therefore *ātmānam* in the kārikā means *śabdādyātmanā*. The same can be further elucidated by what Abhyāṅkara⁹⁴ says on the necessity of postulating *bhūtas* and *indriyas*—the formula is that liberation is caused by the knowledge of the difference in Puruṣa and Prakṛti; but Prakṛti is too subtle to be known and it can be known through its effects only; *prakṛtivikṛtis* are also difficult to know and therefore *bhūtas* and *indriyas* are admitted as *tattva*; and there is no necessity of multiplying the *tattvas* by further accepting cow, pot, etc., separately.

How can Prakṛti, that is, *vibhu*, turn back? The trouble could be simplified, if it was held that the Prakṛti did not turn back but that it was only recognized in its true colour and so the *samsāra* ceased for the individual Puruṣa. This explanation would have been faultless, but the Sāṅkhya bases all movement in Prakṛti on its *saṁyoga*⁹⁵ with Puruṣa⁹⁶ without which it will remain always inactive. The meaning of *saṁyoga* cannot be restricted to sympathetic response⁹⁷ because Puruṣa is quality-less.

⁹⁴ In commenting on Sarvadarśanasamgraha, Bhandarkar, O.R.I. Publication, p. 319.

⁹⁵ But in kārikā 66, *saṁyoga* is left of no importance—creation is due to ignorance and it ceases when Prakṛti has accomplished the enjoyment and release of Puruṣa because then there remains nothing more for it to do, even if there is *saṁyoga*.

⁹⁶ Pāñcarātras add one more principle, *kāla*.

⁹⁷ Vijñāna holds a real contact and differentiates between contact and change; therefore contact does not bring change in Puruṣa.

Some say that after the release of Puruṣa, Prakṛti keeps aloof assuming the form of some god. Different *tattvas* having different superintending deities, *adhidaiva*, is a conception of later Sāṅkhya.

KĀRIKĀ 60.—Vācaspati and Candrikā have used the kārikā to strengthen the pre-mentioned idea of selflessness in Prakṛti, but Māthara and Gauda wrongly think that the kārikā gives some clue to the cause of cessation of activity in Prakṛti. Māthara has well characterized the relation of it and Puruṣa as—like the feather of a peacock he is painted only on one side.

KĀRIKĀ 61.—Gauda has a quaint explanation in store—Prakṛti has no further cause and therefore it does not again come in view of the released Puruṣa; for that reason it is *sukumāratara*,⁹⁸ i.e., it has no better lord over it like īśvara, etc., as its cause. While Jayamāngalā says that before knowledge Prakṛti shows itself only in *vyakta* form and when knowledge is attained, it feels that it has no subtler⁹⁹ form than *avyakta*. It should plainly mean sensitiveness.¹⁰⁰ Vāmśīdhara uselessly tries to justify on all fours the example of *kulavadhū* by saying that it refers to the *jada* body and *buddhi* that looks *cetana* on account of the proximity of Puruṣa; but he has not noted a greater disharmony when Vācaspati and Gauda say that she does not see other persons.¹⁰¹ The case is opposite with Prakṛti; it ceases for the Puruṣa who has the discriminative knowledge, and continues to charm the remaining lot.

⁹⁸ Here = *subhogyatara*.

⁹⁹ Here = *sūkṣmatara*.

¹⁰⁰ Nyāyamañjari objects to the delicacy of Prakṛti which is enjoyed by infinite number of Puruṣas; and Hall in translation of Gore: 'Hindu Phil. Systems' objects because it is insentient.

¹⁰¹ They could have safely said that she does not see again the same person.

KĀRIKĀ 63.—Candrikā wrongly says that *ātmanā* = *buddhirūpena* and *ātmānam* = *puruṣam*; Prakṛti binds itself by itself, no blot stains the Puruṣa.¹⁰² How is *acetanā* Prakṛti either bound or released? *Bhoga* will mean *avasthā*, *lakṣṇā* and *parināmabhedas* that are visible in Prakṛti.

KĀRIKĀ 64.—*Kevalam* = not mixed with *viparyaya*¹⁰³ but Candrikā strangely equates it with what is visible to Puruṣa only, which is not a sound expression because of the disinterestedness of Puruṣa.

KĀRIKĀ 65.—*Svasthah*—*ātmani sthito na prakṛtisthah*, *tataḥ prakṛteḥ nivrittatvāt*, according to Jayamāngalā; but Vācaspati reads *susthah* and strains its meaning to suit the context—he still has a slight mixture of *sāttvikī buddhi*,¹⁰⁴ otherwise he cannot see Prakṛti. Vācaspati admits this mixture only in *Jīvanmukta* state; but what is the harm if it continues in *mokṣa* state also? It will then facilitate the understanding of the multiplicity of Puruṣas even when they are released.

KĀRIKĀ 66.—Gauda and Māthara have given two worldly examples to illustrate the cessation of all activity in Pradhāna—(1) when debts are cleared, and (2) as no progeny from cohabitation of the old.

KĀRIKĀ 67.—*Jīvanmukta* state¹⁰⁵ is not possible because when indiscrimination is destroyed there can remain no body. Vijnāna.¹⁰⁶ surmounts the difficulty by saying that indiscrimination and actions work only

¹⁰² Strengthened by *saiva* in the second half of the kārikā.

¹⁰³ Vācaspati, Gauda.

¹⁰⁴ Tilak in *Gitārahasya* thinks it a device to avoid increasing the number of *guṇas* by accepting one more finer state.

¹⁰⁵ Yogavārttika thinks that *asamprajñātayoga* is superior to knowledge because it overcomes *prārabdhakarma*.

¹⁰⁶ On Sūtra 1. 24.

through *samyoga* and this *janmākhyasamyoga* is not destroyed without the fruition of *prārabdha*.

KĀRIKĀ 68.—Rāmāvatāra Sarmā has pointed out *yatibhaṅga* in 'Pañcaśikhāya tena.'

The last three kārikās are missing in Gaudapāda-Bhāṣya. Wilson first noted the point that the Sāṅkhya-Kārikā had only 69 verses and one verse was lost. Mr. Tilak reconstructed the missing verse from bhāṣya on kārikā 61 and thought that it was dropped because it was very atheistic. But it is not clear on what ground the loss of one kārikā is manifest. If the already existing 70th verse is to be rejected as not forming an essential part of the *Saptati*, the 69th verse can also be rejected on the same ground. Disquisition of the principles of the Sāṅkhya is over at the 68th kārikā and if the 69th kārikā is necessary to impress the authenticity of the work, the 70th is needed to give the line of succession of old teachers, and the uninterrupted tradition of the system.

SECTION IV

ARABIC AND PERSIAN



SŪFIISM AND ISLĀM

(AN EXPOSITION OF THE IDEA OF SŪFIISM OR
“ ISLAMIC MYSTICISM ” FROM THE ORIGINAL,
ORTHODOX STANDPOINT.)

BY

MAHBUB ‘ALI

How far Islamic mysticism corresponds with the positive and real teachings of Shari‘at-ul-Islām, is the question to be studied in the following pages.

It will consist of a preamble and a series of articles bearing upon the particulars set forth in that preamble.

The discourse will involve the following items of research :—

- (1) The inquiry into the origin of the words “ Sūfi ” and “ Taṣawwuf ” and the notion or the group of notions out of which it first originated, setting forth its full and exhaustive connotation.
- (2) The next aim which is to be dependent upon the results obtained by the inquiry into the first one would be to show that the prevalent misconception as to the implication of the term and the idea that Sūfism is a path divergent from and positively in variance with the teachings of Shari‘at-ul-Islām is entirely baseless.

To prove the above fact by the sayings of the very exponents of Islamic mysticism, like Shaikh Abū Sa‘id Abu'l Khair, ‘Abdu'l Karīm Jilī, Muhyyyu'ddin Ibnu'l 'Arabī, etc., the so-called

promulgators of liberal views, amounting in the opinion of their European critics, to heresy.

- (3) To make an elaborate survey of the field of mysticism as provisioned by the Islamic Shari'at and to show that almost all the recognized principles and technicalities, even most of the ritualisms, have their prototype and origin, express or implied, in practices and sayings of the first four Caliphs and the other associates of the Prophet.

The Sūfīc ceremonials such as سَاعَ (music and singing), حَلْقَةُ الْذِكْرِ (the circle of recollection), بَيْعَةٌ (discipleship), مَاقِبَةٌ (watching over the inmost self), خُرْقَةٌ (gaberdine), خَاتَفَةٌ (monastery), etc., and the Sūfīc technicalities such as مَجاهِدَةٌ (self-mortification), خَلْوَةٌ (seclusion), كَرَامَةٌ (miracle), فَنَادٌ (passing away from self), عَدْمٌ (not being), حَقٌّ, جَوْهَرٌ (real being), لَطِيفَةٌ (the substance of God's Grace), قَبْضَةٌ (contraction), بَسْطَةٌ (expansion), يَقِينٌ (certainty), مَلَامِتٌ (exposition to blame), احْوَالٌ (ecstasies), and so on,—have been wrongly taken to point to something novel in Islamic religion and to be contrary to both the form and the spirit of the faith in its purity and simplicity.

The so-called distinction between Shari'at (the sacred law of Islām) and "Tariqat" (the path of Sūfiism) is due mainly to the wrong belief entertained in relation to the Islamic Sūfiism, more especially by modern European writers.

It is to be shown that these critics have not only themselves lost the aim and spirit of true Sūfiism which was in its original and basic form nothing else than the purification of soul, the attainment of the knowledge of truth through self-mortification, deep devotion and strict, firm and constant practice of the commandments of the orthodox

"Shari'at" and ultimately the union with the Creator—the *summum bonum* and the ultimate aim of the creation and existence of the human beings—but they have been the source for giving rise to a number of misconceptions concerning Sūfism itself both within and without the sphere of Islamic society.

This fact has also contributed most strongly towards the nourishment of the belief that the Sūfic rites and technicalities like those mentioned above are the ones invented by the mystics at some later stages of Sūfic evolution and that they have no existence in the original code and the fundamental teachings of the Islamic faith.

The following is the list of some of the most important works on the subject of Sūfism:—

- (1) *Kitabu'l Luma'*—by Abū Naṣr Sarrāj Ṭūsī.
- (2) *Kashfu'l Mahjūb*—by Al Hujwīrī.
- (3) *Futūhu'l Ghaib*—by Sayyid 'Abdu'l Qādir Jīlānī of Baghdād.
- (4) *Ghunyatū'l-Tālibīn*—by Sayyid 'Abdu'l Qādir Jīlānī of Baghdād.
- (5) *Manṭiq-uṭ-Tair*—by Farīd-ud-Dīn 'Attār.
- (6) *Tadhkīratu'l-Awliyā*—by Farīd-ud-Dīn 'Attār.
- (7) *Lawā'iḥ*—by 'Abdu'l-Rahmān Jāmī.
- (8) *Nafāḥatū'l Uns*—by 'Abdu'l-Rahmān Jāmī.
- (9) *Al-Risālatu'l Qushairyyah*—by 'Abu'l Qāsim Qushairī.
- (10) *Iḥyā'u'l 'Ulūm*—by Al-Ghazālī.
- (11) *Kīmiyā-i-Sādat*—by Al-Ghazālī.
- (12) *'Awārifu'l Ma'ārif*—by Shaikh Shihāb-al-Dīn Suhrawardī.
- (13) *Hadīqah*—by Ḥakīm Sañā'ī.
- (14) *Kitābu'l Ta'arruf Fi'l-Taṣawwuf*—by Abū Bakr Muḥammad Ibrāhīm al-Bukhārī.
- (15) *Maṭālib-i-Rashīdī*—by Shāh Turāb 'Alī Qalandar.

- (16) *Fuṣūṣ-al-Hikam*—by Muḥyy-al-Din Ibnu'l Ḥarābī.
- (17) *Futuhātu'l Makkiyyah*—by Muḥyy-al-Din Ibnu'l Ḥarābī.
- (18) *Kitabu'l Yawāqīt wa'l Jawāhir*—by 'Abdu'l Wahhāb Sha'rānī.
- (19) *Al-Ikhtisār*—by 'Abdu'l Wahhāb Sha'rānī.
- (20) *Tabaqātu'l Awliyā*—by 'Abdu'l Wahhāb Sha'rānī.
- (21) *Mīzānu'l Sharī'at*—by 'Abdu'l Wahhāb Sha'rānī.
- (22) *Al-Hadīqat Al Nadiyyah*—by 'Abdu'l Ghānī-al-Nablusī.
- (23) *Jawāhiru'l Nuṣūṣ*—by 'Abdu'l Ghānī-al-Nablusī.
- (24) *Maktubāt*—by Mujaddid-i Alf-i Thānī of Sarhind.

The following are the leading authorities on Sūfiism :—

- (1) Muḥyy-al-Din 'Abdu'l Qādir Jīlānī.
- (2) Shaikh Shihāb-al-Din Suhrāwārdī.
- (3) Shaikh Farīd-al-Din 'Attār.
- (4) Shaikh 'Abdu'l Wahhāb Sha'rānī.
- (5) 'Ali b. 'Uthmān al-Hujwīrī.
- (6) Abū Bakr Muḥammad Ibrāhīm-al-Bukhārī.
- (7) Al-Ghazālī.
- (8) Sayyid 'Abdu'l Kārim Ibrāhīm-al Jīlī.
- (9) Mawlānā Jalāl-al-Din Rūmī.
- (10) Muḥyy-al-Din Ibnu'l Ḥarābī.
- (11) Sayyid 'Abdu'l Ghānī al-Nablusī.

SHARĪ'AT-UL-ISLĀM—ITS CONCEPTION.

It is held by some persons not thoroughly conversant with the true idea of Sharī'at-ul-Islām that " Sharī'at " is simply a name given to a code of law consisting of a number of فرائض (positive religious commandments), اجيات (the most necessary points relative to religion), حلال (the legal or legitimate things in religion), حرام (things unlawful in or forbidden by religion), etc. This idea is absolutely wrong. The Sharī'at, as it is, is nothing but the embodiment and the sum-total of the entire system of commandments relating equally to the physical, mental and spiritual existence of human beings. It encircles all mystical and theological ideas and admits within its scope all those eternal truths and dogmas of which طریقت (the path of Sūfiism) forms but a component part. Consequently it has been observed as a duty by all saints, spiritualists and professors of Islamic faith to refer all their truths and observations to one single test of Sharī'at. Sharī'at is the touchstone to which all the different types of dogmas are applied and tested. If they correspond with it they are genuine and admissible, otherwise false and rejectable. Sharī'at is the pith and marrow of faith and the keystone of religion. It is like the central body in the cosmos round which all the other planets revolve. The word " Sharī'at " is synonymous with the word " Path," i.e., the path led by the Prophet of Islām—peace be on him—and the phrase " the path of the Prophet " is to be used in the absolute and the general sense instead of a limited one to signify only a number of commandments relating to the physical side of man. It is the " path " to which a Muslim refers when he pronounces in his daily prayers the verse of the Qur'ān اهذن بالصراط المستقيم (Guide us to the right path), that is, the path of our Prophet, the firm adherence to which is the positive and bounden duty of every true believer of Islām.

In the second part of this discourse I propose to give a number of quotations out of the sayings of some of the prominent Sūfīs to show what point of view they took of Sūfiism (the path of Divine Knowledge), what was their conception of "Taṣawwuf," and how far they held its laws to correspond with those of the Shari'at in all its items and details. This would be to show that the "Shari'at" (the orthodox religion) and the "Tariqat" (the Sūfic path) are together not only inseparable, but are really the different names given to one and the same code of law—the one Shari'at (in the popular sense) referring more to the outward form than the essence of the religion, while the other called "Tariqat" devoted more particularly to its internal or spiritual phase than the external. Apart from being mutually independent, they are the two vital organs of the one and the same system, i.e., the religion of Islām, so that in the absence of either of these two the system cannot work. "Shari'at" is simply a name given to the aggregate of the Islamic religion. The more popular word "Shari'at" is generally expressed to suggest the sum-total of Islamic faith, and similarly the word "Sūfiism" is really but a synonym for Islām with special reference to its essential rather than its superficial side. It is the circumstance of the new word "Taṣawwuf" being coined and circulated that has led to the efforts for its application to one particular phase (i.e., spiritual) of religion, with an obvious disregard of the former, i.e., orthodox Islām.

This point will be discussed in some detail in connection with the discussion as regards the origin of the word "Sūfi." In the later periods of Islām, classes of men devoted particularly to religion and piety prided in being known by the name "Sūfi," not because it signified something in their character other than or in addition to that, which the wider and the more common expression "Muslim" does, but because by calling themselves

"Sūfīs" rather than "Muslims," they meant to give particular emphasis to that essential side of religion (spiritual) which had begun unfortunately to be so much neglected in particular by a majority of its adherents all through the community.

Etymologically the word "Shari'at" includes and involves everything concerning religion whether outward or inward, physical or spiritual, pertaining whether to ظاهر اعمال (forms and practices) and to عقائد (religious beliefs) or to تكية النفس (purification of heart and soul) and to مساجدات (self-mortifications) and to رياضات (exertions), in order to secure that purification of heart—while Tariqat (the path of Sūfism) or معرفة (gnosis or the Divine Knowledge), are words coined in order to signify and emphasize that important phase of the shari'at which might either have been thrown into background or partly neglected by a number of its unscrupulous exponents in the later periods of Islamic history. Thus "Tariqat" or "Ma'rifat" is but the further reiteration of a part of conception already included in the common expression "Shari'at."

In order to establish the point more perfectly and to bring about complete refutation of the adverse opinions of the critics I shall deal with this part of my discourse at some length, giving in this connection some fifty-eight quotations from different Sūfi saints of recognized learning and piety.

ORIGIN OF THE WORD 'SŪFĪ.'

Under this item of my discourse I propose to discuss briefly the origin of the terms Sūfi and Taṣawwuf and examine some of the most authorized opinions advanced by the original authorities on the subject, like Abu'l Qāsim Qushairī, 'Alī b. 'Uthmān Hujwīrī and Shaikh Shihābu'd-Din Suhrawardī, as to the derivation of the

words and the original conception attached to them together with the gradual changes that might have occurred in the conception through different periods of Sūfic evolution. I deem it unnecessary in this connection to enter into any elaborate details concerning the discussion as to the origin of the words and their derivative sources, as the work has already been elaborately done by the abovenamed writers, viz., by Abu'l Qāsim Qushairī in his remarkable book Al-Risālatu'l-Qushairiyah and by Hujwīrī in his Kashfu'l Mahjūb and by Shihāb-ud-Din Suhrawardi in his 'Awārif Ma'ārif.' Thus after relating briefly the most authorized views advanced on the question by the prominent authorities and adopting the most favoured opinions formed on the matter, I shall pass on to the more important part of the subject.

In connection with this I shall pay special attention to the giving of a clear and true interpretation of the sayings of some great Sūfi saints together with the explanation of the nature and rationale of certain Sūfic technicalities, to show that in their essence they are by no means foreign to or incoherent with the orthodox Sharī'at and the assertion that they are an innovation in the Islamic religion is untenable.

As regards these observances and technicalities it is to be shown that they all spring out of the fountain-head of the orthodox Sharī'at and are recognized by and embodied in the Qur'ān and the Ḥadīth ; though they in course of their onward flow, being influenced by the current of communal or sectional caprices might look to have adopted an obviously divergent and novel form.

In the latter part of this section I shall examine in brief the Sūfic ideas as they originated in the time of the Prophet and propounded by him through numerous verses and precepts as essential elements of religion, prevailed

as dominant religious factors in the days of the *Sahābah* and then in those of their followers تابعيين and then the followers of the followers تابعيين and were transmitted by them to the later generations till they reached our own times.

I shall, further on, give details of the important monastic hierarchies and the *Sūfi* "orders" formed in the later periods among *Sūfi* communities all over the Muslim world together with an observation of their distinctive features as regards the details concerning their respective modes and teachings.

The word "Taṣawwuf" is an innovation in Islām. The term *Sūfi* seems to have been invented by the men of Baghdād. The Qur'ān calls اهـل الصـفـة (men of the *Suffah* or bench)—to which this class has been attributed with the designation of فـقـراء (poor or destitute). A verse of the Qur'ān runs thus:—

الْمَهَاجِرُونَ الَّذِينَ أُخْرِجُوا مِنْ دِيَارِهِمْ ... الْحَ

"for the destitute who have been expelled from their homes."

Another:—

لِلْفَقِيرِ الَّذِينَ أُحـصـرـوـا فـي سـبـيلـ اللـهـ ... الـحـ

"for the destitute men who have been detained in the way of God."

According to Abū Naṣr Sarrāj (*Kitabu'l Lum'a*, page 26) Syrians also call them by the name فـقـراء, although in the opinion of Abū Naṣr the word is not an invention of the men of Baghdād, but is traceable in times considerably earlier.

In *Kitabu'l Lum'a* he writes:—

"But it is impossible to believe that it is a newly created term that has been invented by the men of Baghdād. One of the chief reasons is the fact that it was pre-

valent in the time of Ḥasan of Baṣra and Ḥasan was contemporary to a party of the اصحاب (associates of the Prophet). It is related of Ḥasan that he has said: 'In course of my طرائف (circuit round the Ka'bah) I saw a Sūfī and offered to give him something, but he refused to take it.' In a book in which the stories connected with Mecca have been collected, it is related of Muḥammad b. Yasār and others that in a certain period prior to Islām the city of Mecca had been vacated to the extent that nobody followed the customary circuit round the Ka'bah. In the meantime there used to come from some far and distant country a 'Sūfī,' performed the ceremony and went back."

If the above account be taken as correct, it would prove the fact that the term was prevalent in pre-Islamic times and was applied to men exclusively devoted to virtue and piety.

But as far as the historical sources are concerned, the first man to receive this title in Islamic time was Abū Hāshim Sūfī—a contemporary of Sufyān Thawrī, who died in the year 150 A.H. (*Kashfu'l-Zunūn*).

This much has been admitted even by the leading Muhammadan Sūfīs that the period of invention of the term lies somewhere in the period after the days of Shāhābah (the associates of the Prophet). Qushairī says in his Risala: "After the time of the Prophet no special and distinctive name was given to the 'Shāhābah,' because of the fact that there could possibly be no honour for them above that of the Prophet's companionship."

After Shāhābah there sprang up the title of تابعيين (followers of the Shāhābah). After this, as time went on prominent men of learning and piety came to be distinguished by the name of عابدون؛ اهله ون (devotees).

But as the men of every group of society, even the

"heretics," claimed to be ascetics and devotees, so they, in order to be distinguished from the rest of the men in the community of Ahl-al-Sunnat-wa'l-jama'at (the actual followers of the ways and manners of the Prophet) who were specially devoted to gnosticism and piety, came to be called "Sūfīs." Thus the appellation "Sūfī" had been invented prior to the lapse of the third century A.H. Even Abū Naṣr in his book "Al-Lum'a" admits this much and says: "If anybody puts forth an objection as to the cause why we do not hear the name of 'Sūfī' in the days of Ṣahābah (companions of the Prophet), nor even after their time there can be found any mention made of such word"—with reference to those times we are aware of such terms as عابدون، و سپاه (wanderers), and فقرا (destitute persons), but no Ṣahābī (companion of the Prophet) is known to have been called by the name of "Sūfī"—then as an answer to the objection I would say that the companionship of the Prophet is itself a mark of honour and superiority, so much that whosoever was fortunate enough to possess it, no other title of honour, however grand it might look, could be properly given him. Do you not observe the fact that it is these men who are the Imāms (heads) of all the saints, devotees, servants and gnostics, and all those perfections and honours they have derived through the blessed companionship of the Prophet—peace be on him! Thus when the dignity of these persons is attributable exclusively to the companionship of the Prophet which is the noblest of all the ranks and attributes, it is impossible, in face of such dignity, to give them a title of honour on any other basis.

Opinions differ as to the derivation of the word "Taṣawwuf." Some attribute it to أصحاب الصفة (men of the bench or verandah), according to others it is derived from "Ṣafā" (purity), and according to some others it

comes from the word “*Saff*” (line). But judged according to the rules of derivation all the above statements appear obviously erroneous. In *Kitābu'l Lum'a* it is mentioned that the word “*Sūfī*” was formerly “*Safwi*” which owing to its sluggishness came gradually to be pronounced as “*Sūfī*.” It could naturally have been derived from “*Suf*” which means “wool,” but as a matter of fact the wearing of wool has never been a peculiar attribute of the class. So far is the view adopted by *Qushairī*. But *Ibn Khaldūn* says that although wearing of wool is not a distinctive feature of this class, yet it has been found that these people mostly wear woollen garment, and so he holds the derivation to be preferable. *Kitābu'l Lum'a* says that “men of *Hadīth*” (Traditionists) are attributed to *Hadīth*, and the men of *Fiqah* (or Jurists) are attributed to religious law. But with *Sūfī* the case is different. He cannot be attributed to any particular branch of learning or to any special kind of qualification, for he is the sort of man who does not possess any particular relation to any of these qualities, while his self is at once the combination of all these qualities without having any special connection with any particular learning, qualification or locality. Besides this, his conditions (spiritual) are subject to changes, oscillations and innovations at every next moment, while he goes on praying God continually for further additions in his spiritual ranks. So if he be attributed to any special qualification he must necessarily be attributed to a fresh quality at every fresh moment. In view of this difficulty it was thought expedient to attribute them to their outward personal peculiarity, and that was “the wearing of wool” which has ever been a badge of distinction of the prophets, saints and devotees, and which gives in a concise form a clue to all their learning, actions, characters and qualifications. Companions of Christ have also been attributed by God to

their external apparel, Who has called them “ Hawariy-yūn ” حواريون . These men wore white clothes, so instead of being attributed to their actions and conditions they were attributed to one common peculiarity that concerned their dress.

Hujwīrī seems to favour the derivation of the word “ Sūfī ” from Ṣafā (purity). In his famous work Kashfu'l Mahjūb, in connection with the discussion as to the derivation of the word he says:

“ Some assert that the Sūfī is so called because he wears woollen garment (Jāma-i Ṣūf); others assert that he is so called because he is in the first rank (Ṣafi-Awwal); others say it is because the Sūfīs claim to belong to the Aṣḥāb-i-Ṣūffah, with whom may God be well pleased! ; others again declare that the name is derived from Ṣafā’ (purity). ” These explanations as to the true meanings of Sūfism are far from satisfying the requirements of etymology, although each of them is supported by many subtle arguments. Ṣafā’ (purity) is universally praised and its opposite is “ Kadar ” كدر .

The Prophet—on whom be peace!—said: “ The Ṣafā (pure part is the best) of this world is gone, and only its Kadar (impurity) remains. Therefore since the people of this persuasion have purged their morals and conduct, and have sought to free themselves from natural taints, on that account they are called ‘ Sūfīs,’ and this designation of the sect is a proper name (از اسلامی عالم) inasmuch as the dignity of the Sūfīs is too great for their transactions (Mu‘āmalāt) to be hidden, so that their name should need a derivation.”

In another place he says: Sūfī is a name which is given and has formerly been given to the perfect saints and spiritual adepts. One of the Shaikhs says: “ He that is purified by love is pure, and he that is absorbed in the Beloved and has abandoned all else is a ‘ Sūfī.’ ” The

name has no derivation answering to the etymological requirements, inasmuch as Sūfism is too exalted to have any genus from which it might be derived ; for the derivation of one thing from another demands homogeneity (*Mujānasat*). All that exists is the opposite of purity (*Safā'*) and things are not derived from their opposites. To Sūfīs the meaning of Sūfism is clearer than the sun and does not need any explanation or indication. Since Sūfī admits of no explanation, all the world are interpreters thereof, whether they recognize the dignity of the name or not, at the time they learn its meaning.

KHĀNQĀH (MONASTERY).

It must at any rate be admitted that monasteries are among a number of other innovations the existence of which cannot be traced back up to the time of the *Sahābah* (companions of the Prophet), and which came into being considerably afterwards. In the time of the *Sahābah* they were quite unknown things. Still it is a serious mistake to attach to them a technical importance and regard them as a positive mark of innovation. They should only be looked upon as places which provided shelter to Sūfīs who assembled together to carry on their esoteric life in a safe corner apart from the world and its distracting annoyances. Just as it has been a custom to build forts for soldiers to take shelter in during wars, schools and colleges for students to assemble in for acquiring knowledge, poor-houses and orphanages for the destitute and orphans, these monasteries were the houses built or the places set apart for religious devotees where they carried on the task of divine recollection with perfect freedom. As the time still went on they were supported through grants, bequests and endowments by wealthy persons of the community and by the state. The first monastery of this type is said to have been built at Basra.

Apart from the monumental innovations that relate to the outward structure of Sūfiism there is also a number of obvious changes that seem to have taken place in relation to its internal method and organization. Although the personality of the Ṣahābah was an embodiment and the sum-total of all the elements of Sūfiism taken together, yet in their case perfect harmony was maintained and no chance was given for any of these elements to get beyond the limits of moderation and disturb the balance.

SAMĀ' OR AUDITION.

The origin of the ceremony of Samā' (audition) seems to be the following:—

The Ṣahābah used to assemble together now and then and asked somebody present to recite verses from the Qur'ān; so one of them recited while the rest listened. 'Umar used to say: "O Abū 'Ubaidah, make us recollect our Lord!" They then recited while all of them sat listening to them. Some of the Ṣahābah used to say: "Come, let us refresh our belief in the Almighty for a moment!"

The Prophet—peace be on him—a number of times performed his *ṣalāt al-nafā* (supererogatory prayers) in congregation with his companions. He once came to the *as-Saḥāla* (men of the bench); there a reader (of the Qur'ān) was reading verses of the Qur'ān; he sat by them and kept hearing. Usually in the meeting of the *għawwix* (audition) and on the occasion of the observances of divine recollection the feeling of remorse and divine fear that is produced within the heart and causes tears to flow out of the eyes and a thrilling sensation to run through the body are in accordance with the specifications in the Qur'ān and the "Sunnah," the best of human qualifications, but as regards extreme uneasiness of mind, swooning, occurrence of death, shriekings—except in cases when a man is sub-

ject to a fit of ecstasy (in which case he is free from blame, as often happened in case of تابعین and those who came after them), which occurred when a powerful sensation struck their hearts which they had no power to bear. But even in such cases forbearance and steadfast calmness, as was maintained by the Prophet and the Sahābah is preferable, although to produce enforced calmness on such occasions is not commendable and is a thing productive of no beneficial effects. In fact, the best kind of سماع (audition) and one that can effectually bring about the purification of heart is the سماع of the Qur'ān. But there are certain classes who, having neglected this noble kind of سماع, began to hear sonnets and poems sung, indulged in all kinds of wanton frivolities such as the slapping of hands, long-drawn melodies, etc., which bear a resemblance to the whistling of the infidels and are the practices expressly forbidden by God.

KHIRQĀH (GABERDINE).

Although among the prevailing Sūfic technicalities there is none such that can be precisely and clearly traced back up to the time of the Prophet or to that of the Sahābah, still if we rest aside for a moment from the apparent technicalities and titles, conventional Sūfic ceremonials and all other obviously anomalous courses adopted afterwards, we shall find that almost all the essential elements of Sūfism had originated in the very times of the Prophet and the Sahābah.

Shāh Wali-u'llah says in his book الانتباه فی سلسلہ ولیاء اللہ " As for the origin of Khirqāh (gaberdine) it should be noted that the Prophet bestowed his garment on 'Abdu'l-Rahmān b. 'Awf, on the occasion of his conferring upon the latter the office of the commander of the army. This may be looked upon as the prototype of the modern Sūfic custom of conferring Khirqāh رسم خرقہ پوشی ."

BAI'AT (DISCIPLESHIP).

As for the Bai'at (discipleship) the assertion that the custom is traditional from the Prophet himself is a historical fact, and is expressly mentioned in the Qur'ān. But up to that time the system was not yet organized as to its outward ceremonials and principles as is the case now. In those times the organization of the Ṣūfic circles was only effected by means of spiritual bonds that tied together with its different organs, keeping the entire system in regular order.

In the early periods of Islām, the mutual intercourse among the Ṣūfic parties was based upon companionship, union and love, the chief object of which was the cultivation of good morals, the rectification of habits and the purification of heart from base and morbid inclinations, rather than being grounded upon the ceremonious bases of Bai'at (discipleship) and Khirqāh (gaberdine).

The custom of wearing gaberdine was first introduced in the time of Junaid of Baghdād—the system of Bai'at was introduced afterwards. The chain of its relation to its origin was unbroken and authorized, while the difference as to the obvious modes of connection makes no harm.

Thus both "Khirqāh" and "Bai'at" have got their origin in the sacred "Sunnah."

He gives further explanation of the same point in the "Izālat-u'l Khifā'" in the following words:—

Here comes the point which must necessarily be kept in view. Up to the days of the Ṣahābah (companions of the Prophet), Tābi'īn (followers of the Ṣahābah) and Tab'i Tābi'īn (followers of the followers), the Mashā'ikh (spiritual directors) held intercourse سُكْبَت with their disciples not on the ground of Bai'at (discipleship) or خرقہ پوشی (wearing of gaberdine), but only with regard to the benefits of companionship. They never used to content themselves with a single Shaikh or a single سُلَسلہ (Ṣūfic order),

but often one man sought company with a number of *Mashā'ikh* and thus used to acquire relationship with a number of سلاسل (Sūfic orders), and consequently his line of connection could not be traced back precisely up to any particular *Šahābī*, except in cases where he has himself confessed of having derived influence out of the company of some particular " *Šahābī*" or he had been in his company for a considerable time or else he had become famed as the companion of that *Šahābī* and thenceforth that particular mark had become specified as a mark of distinction in relation to such companionship.

THE ORTHODOX CALIPHS.

In Sūfic circles generally as well as among the recognized Sūfic dynasties the Orthodox Caliphs خلفاء اشداء more specially the first two, i.e., Abū Bakr and 'Umar appear to be more prominent in bestowing فیض روحانی (spiritual bounty) than the rest. Shāh Wali u'llāh in his *Izālat-u'l Khifā* says:—

After *Fiqah* (Islamic jurisprudence), the most profound knowledge is the knowledge of *Ihsān* (Sūfism). It is one that is at present known by the name of علم السلوک (the knowledge of the divine path). Books like قوت القلوب and احیاء العلوم have been written to discuss the subject.

The first two Caliphs Abū Bakr and 'Umar are the greatest "intermediaries" between the Prophet and the whole of the Ummat (Muslim community) whose duty is to teach these lores, by word and action, to the rest of mankind and to utilize their best efforts to give publicity both by word and action to these learnings so that they may spread far and wide, and the men far and near may derive benefit from them.

In the two books mentioned above, one can acquire a good deal of knowledge related from these two persons (i.e., the two Caliphs Abū Bakr and 'Umar).

Although it is held that there is a سلسلہ (Sūfiic hierarchy) that begins from the Prophet through the medium of 'Umar, yet according to the common belief of the Sūfi classes the most of the Sūfi orders of discipleship are attributed to 'Alī, the fourth Caliph.

I give here a table of the more important Sūfi *silsilas* which will make the point clearer:—

Name of order.	Name of the Caliph to whom attributed.	Name of the first saint through whom it runs.	Remarks.
Naqshbandiyyah ...	'Alī and Abū Bakr.	Hasan of Baṣra.	Prevalent mostly in India, Central Asia and also in Mecca and Medina.
Qādiriyyah ...	'Alī ...	Do. ...	Prevails in Arabia and India.
Chishtiyyah ...	'Alī ...	Do. ...	Popular in India.
Kubrawiyyah ..	Do. ...	Do. ...	Prevalent in Turan and Kashmir.
Shādhili	Do. ...	Do. ...	Popular in Western Africa, Egypt and Sudan.
Shattariyya ...	Do. ...	Do. ...	Prevails in India.

All these orders begin from the Prophet and through the medium of 'Alī pass on to Hasan of Baṣra who derived spiritual instructions from 'Alī.

The ceremony of wearing Khirqāh (gaberdine) is also said to have begun from 'Alī, as Shāh Walī u'llāh in his انتیهات says:—

Shaikh Majduddin of Baghdād mentions in his book named تحفة الربوبيّة that the attribution of the custom of wearing 'Khirqāh' is traceable through reliable traditions to the Prophet and that it was the Prophet himself who first made 'Alī wear 'Khirqāh' and has in this connection mentioned all those attached to his chain of disciple-

ship on this basis. But اهل حدیث (the traditionists) refuse to recognize this attribution of gaberdine to the Prophet.

THE MYSTICISM OF THE 'SAHĀBAH.

Sūfism in its present form is nothing but a name given to certain beliefs and practices peculiar to the class, while up to the time of the "Sahābah" no belief exclusively peculiar to Sūfism had come into existence. It seems probable that the establishment of certain special Sūfic dogmas and beliefs is due to the prevalence of philosophical ideas and the intercourse with the neo-Platonic philosophers that took place in the later Islamic times. Certain philosophical sayings seem to prove this assertion; for example, some Sūfīs hold that man's body is عالمِ اصغر (microcosm).

Such beliefs, of course, borrowed originally from Zoroastrian and heathen philosophy, came to be regarded afterwards as genuine Islamic ideas to which additions were made from time to time until a large edifice of blasphemous nonsense was erected upon its basis in the name of religion, while as a matter of fact it has nothing to do with the Islamic religion at all.

With the Sahābah the case was quite different. They were altogether immune from the destructive and degenerating influences of such ideas. They had in view the noble personality of the Prophet which was unquestionably the fountain-head of all spiritualism and all morals. To the Sahābah (companions) he was the "Lamp of Guidance" from which they had acquired light, and this is the cause why their mysticism does not contain any element other than true spiritualism, morality, action, piety, continence, resignation, patience and perseverance. This is the reason why the great Sūfi writers have discussed with considerable emphasis and detail the kind of spiritual and

moral peculiarities of the "Sahābah," of which I propose to give here a brief classification.

THE ORTHODOX CALIPHS.

Abū Bakr Ṣiddīq.

To the Sūfīs, Abū Bakr is the greatest authority on Sūfiism. Shāh Walī u'llāh in his book 'Izālatu'l Khifā writes:—

"The author of 'Kashfu'l Mahjūb' eulogizes Abū Bakr with the following epigrammatic remarks:—

"ان الصفا صفة الصديق ان اردت صوفياً على الحقائق" "An al-safā ṣafat al-siddīq an aridt ṣūfiyā 'alī al-haqīqīn"

'Verily, purity is the characteristic of the Siddīq, if thou desirest a true Sūfī.' Because purity (Ṣafā) has a root and a branch: its root being severance of heart from أغيار (objects other than God) and its branch that the heart should be empty of this deceitful world. Both these are characteristic of the Greatest Siddīq, the Caliph Abū Bakr. He is the leader (Imām) of all the flock of the Path."

According to Abū Bakr Wāsitī, Abū Bakr Ṣiddīq was the first man in the whole امت مکہدیۃ (Muhammadan community) to disclose through an indirect hint the latent secrets of Sūfiism. Out of these secrets thinkers have derived لطائف (subtle meanings). The first and the greatest of these secrets was that when he departed with all his worldly fortune and with each and every object of his belongings for the sake of God and came to the Apostle who asked him what he had left for his family, Abū Bakr replied: "Only God and His Apostle!" This is a remarkable hint for a Unitarian in the reality of Severance (تفريید).

There is a number of other hints اشارات related to have been given by Abū Bakr from which other لطائف (subtleties) can be deduced, and which the men of knowledge (saints and gnostics) are aware of. Besides this there is a number of latent virtues and spiritualistic qualities that

had accumulated in the remarkable person of Abū Bakr, the enumeration of all of which would lodge us into unnecessary details. We shall however give some of them here by way of example:—

His تَوْكِيد (or resignation to the Divine Will) was so great and perfect that he gave away all his fortune in the way of God with the remark that he had God and the Apostle for his family to rely upon.

His abstinence and chastity was such that once he took milk served by his servant and when he learnt afterwards that there was some cause of suspicion about it, he put his finger into his throat and vomited it out.

His foresightedness and vigilance was so great that he performed his نُوافِر (prayers) in the early part of night, lest he should go to sleep in the latter part of the night and miss it. 'Umar used to perform his prayers in the latter part of night. When once the Prophet came to know it, he said: "Abū Bakr kept foresightedness in view while 'Umar, endurance."

His humility was such that while once travelling in company with an Amir, when the latter asked him to mount the camel first or he would himself dismount it, he said: "Neither should you dismount the camel, nor shall I mount it; these paces of mine will be counted to have moved in the path of God."

His abstemiousness was such that while on his death-bed, he ordered the yellow-coloured shirt which he was wearing to be put off and washed. On being asked the reason he said: "Those who are yet alive are more entitled to the use of a new cloth than those who are dead."

He was free from vanity to such an extent that when once the Prophet—peace be on him—said: "Whosoever will loosen his garment by way of vanity to an extent that it would touch the ground, God will not look towards him on the Day of Judgment," he at once said: "One side

of my dress is so loose that in case I do not take care of it, it will hang down to touch the ground"; whereupon the Prophet said: " You do not do this by way of vanity." His self-reliance was so great that when the bridle dropped down from his hand to fall on the ground, he never asked anyone to get it up for him and said that the Prophet (so dear to his soul) had forbidden him to make a request to anybody.

'UMAR B. KHATTĀB.

Kitābu'l Luma' كتاب اللمع says:—

" To Ahli-Haqiqat (men in search of truth and reality) the personality of 'Umar—on the basis of qualities and virtues that are characteristic of him—is a perfect model. For example his habit of wearing rough and coarse cloth, putting aside of evil passions, abstinence from doubtful things and acts, performance of miraculous actions, disregard of popular censure for the sake of establishing truth, putting men far and near on the same level in matters of right and performing hard deeds of devotion are a few of the virtues that are related of him.

'Alī says of 'Umar that whenever the latter said something, a verse of the Qur'ān came (was revealed) to corroborate it.

Ibn 'Umar has said: " Whenever there occurred a difference of opinion among the companions of the Prophet, the verdict of the Qur'ān was in favour of 'Umar."

Abū Hurairah relates that the Prophet has said: " God has particularized truth for 'Umar's tongue and heart."

Again:—

" 'Umar! whenever Satan happens to cross thy path he assumes a divergent course."

The pointed remark of the Prophet: " If there could be a prophet after me, verily that would be 'Umar, son of

Khatṭāb—,” is enough to establish the loftiness of his spiritual dignity.

‘UTHMĀN B. ‘AFFĀN.

Of the Ṣūfīc qualities of ‘Uthmān, sobriety, firmness and modesty are the most prominent. His intrepidity and steadfastness was such that at the moment he was assaulted by the rebel murderers he did not move a bit from his place, nor did he bid any other man to offer resistance. He did not allow the Qur’ān to be removed from his presence up to the last, so that after the happening of his murder the Qur’ān was found stained with his blood. In respect of his modesty it would be enough to say that he never appeared naked in his bath-room even when its door was closed. He himself has said: “Even when I take bath in a dark apartment I feel dissolving modesty for regard of the omnipresence of God.”

Among the virtues related of him in the books of أحاديث (sayings of the Prophet), this quality appears most prominent and that is the reason why he is given the title of صاحب الحياء والآيمان (the man of modesty and faith). دخول في السعادة (concomitance in reserve) is the quality peculiar to the prophets انبیاء صدقین (men of veracity), which means a state in which a man is both inside and outside a thing—he is with everything and apart from everything. Once when Yāḥyā b. Ma‘ādh was asked as to the characteristics of a Ṣūfī, he said: “He must be such that he intermixes with men and at the same time is entirely aloof from all.”

Ibnu'l Jalā, on being questioned as to the true definition of a فقیر صادق (truthful and real fakir), said: “One who is such that whatever he accepts he does for the sake of others, while for himself he accepts nothing.”

The same was the condition of ‘Uthmān. The enormous bounties that he conferred upon men during the early

period of Islām was a fact that was an outcome of this quality. He himself has said that had it not been for the purpose of meeting religious wants he would never hoard money. This is the "Darajah" (spiritual station) which according to Suhail Tastari سہیل تستری "is attainable only by a man who knows well the commands of God. He spends money when God bids him to spend and spares it when He wants him to spare. He saves money for fulfilling his duties, not for satisfying his desires. He is just like a trustee who exercises proprietary rights over the property of his beneficiary, but cannot do so without his consent."

'ALĪ B. ABĪ TĀLIB.

Almost all the Sūfic classes recognize 'Alī as their spiritual head as well as the first authority on the speculative knowledge of Sūfiism. He, himself once pointing towards his heart, said : "There is secret knowledge in this, I wish I could find an acquirer!"

Junaid of Baghdād has said of him: "If 'Alī had not been all through engaged in wars, he would have told us a good many secrets concerning Sūfiism, for he was the man who possessed علم الدنی (Eternal knowledge)."

Still he has told a lot of secrets which are held as bases for Sūfiism. For example, a certain man enquired of him as to the nature of ایمان (faith), whereupon he said: "Faith rests upon four pillars—patience, certainty, justice and exertion." He then continued explaining the stages of Patience.

At this point the author of كتاب الميع remarks: "If the tradition attributed to him is right, then he may be admitted as the first man who has given an explanation of مقامات (stations) and احوال (conditions)."

From the Sūfi standpoint he deserves superiority to the rest of the Sahābah (companions of the Prophet), on the ground that he has elucidated a number of difficult

Sūfic problems ; for it is obvious that " Expression " deserves precedence over " meanings " and " states."

Apart from the scientific point of view, his personality is at once a model for the Sūfīs and a guiding factor in respect of conduct and morality.

His asceticism was such that he once standing at the door of بيت المال (Public Treasury) said: " Ye, dinars and dirhams, go and seek some other man than myself to be your wooer!"

He once addressing 'Umar said: " If you are fond of having an interview with your master, then go and patch your garment, mend your shoes, keep hungry and shorten the strings of your hopes and desires."

When he had suffered martyrdom, his son Ḥasan, ascending the pulpit at Kūfah, made the following announcement:

" Ye, men of Kūfah! the Commander of the Faithful has suffered martyrdom before your eyes—but by God, he has left among the worldly objects only four hundred dirhams which he had set apart with the object of purchasing a slave."

His fear of God was to such a great extent that when the time of prayer arrived, his body shuddered and the colour of his face changed—in this state men asked him about his condition of mind to which he replied that there had arrived the time of discharging that Great Responsibility which God presented before the heavens, the earth and the mountains, but they all refused to bear it and got afraid of it, while it is " man " who bore that Responsibility—now I do not know whether I shall be able to fulfil it properly or not."—(Kitābul Luma'.)

There is a number of other " states," morals and actions that are related from 'Alī which the gnostics and men of ecstatic turn of mind have grasped as the guiding rules of conduct.

ASHĀB-UL-SUFFAH (MEN OF THE VERANDAH).

There was a number of "Sahābah" who, side by side with their religious observances, used to undertake other occupations such as trade and agriculture. But generally these men had exclusively dedicated their lives for getting religious instruction from the Prophet. They had no family and when any of them took a wife, he usually used to get out of this society. During daytime they attended the Prophet's Court of Audience and listened to his noble sayings, while at night they took rest on a platform which was just close to the Great Mosque. In the Arabic language "Suffa" means "platform" and that is why these men are called اصحاب الصفة (the men of the Platform or the Bench). They were so poor that they could never afford to wear two pieces of cloth at a time. They used to tie a piece of cloth round their neck in such a way that it hung down loosely along their thighs. This was all they wore. Abū Hurairah, who also belonged to the same group of Sahābah, gives an account of them in the following words:—

"I have seen seventy of the اصحاب الصفة (men of the Bench) such that their clothes did not reach even up to their thighs. Therefore when during their prayers they fell on their knees they gathered round their clothes with their hands lest they should get naked. Once in the Great Mosque they held their 'Circle of Recitation' in which every one of them sat quite close to the other in order that the naked portions of their bodies may not be exposed to the views of each other."

Their means of subsistence was this that a body of them used to fetch wood from the adjoining forests, sold it and procured food for their brethren. Some of the 'Ansars' (helpers of the Prophet) used to pluck the fruit-laden branches of date palm and hung them by the roof of the Mosque. They then picked up the

dates that fell on the ground now and then, and ate them. Oftentimes they did not get anything to eat for a number of days continually. It sometimes occurred that the Prophet came into the Mosque and conducted prayers—these men joined the congregation, but owing to the slackness and hunger they used to fall down even in the midst of prayers. The outsiders when came in and saw their condition, believed them to be mad. Whenever there came something to be distributed as alms to the poor, the Prophet used to send the whole of it to them. On the occasions of invitation to the repast, the Prophet particularly invited them and dined with them. Sometimes it happened that the Prophet made an appointment for their nightly food with the Prophet مهاجرین (Muhajirin or the Emigrants) and انصار (the Helpers) that each of them should take to his house one or two of these men according to his means and feed them.

Saa'd b. 'Ubaidah was a wealthy and generous man. He sometimes used to take with him as many as eighty men at a time to feed. The Prophet felt a great love and sympathy for them. He sat with them in the mosque, dined with them and bade men to honour and respect them. Once a party of *اصحاب الصفا* (men of the Bench) submitted a complaint before the Prophet to the effect that the dates had scorched their stomachs. The Prophet, on hearing this complaint, made a speech, and in order to pacify their feelings said: "What is that! You say that the dates had scorched your bellies—are you not aware of the fact that the date is the staple food of the citizens of Medina; they can afford to help us only with these, and so we too help you by the same. By God it is one or two months since the smoke has not arisen from the house of the 'Apostle of God,' water and dates being the only objects of food to rely upon."

The routine of life of these men was that they usually

passed their nights in prayers, recollection and the recitation of the Qur'ān. There was a teacher appointed to teach them, to whom they used to go at night to take lessons. They were, therefore, called قارئون (Readers), and when a necessity arose, they were sent to distant places to preach the religion of Islām.

In Chapter IX of his book, "Kashfū'l Mahjūb," Hujwiri gives the following account of the "Aṣḥābu'l-Ṣūffah":—

"Know that all Moslems are agreed that the Apostle had a number of companions, who lived in his Mosque and engaged in devotion, renouncing the world and refusing to seek a livelihood. It is on their account that God has said to the Apostle: 'Do not drive away those who call unto their Lord at morn and eve.' (Qur. vi. 52.) Their merits are proclaimed by the Book of God, and in many traditions of the Apostle which have come down to us. It is related by Ibn 'Abbās that the Apostle passed by the اصحاب الصفة (people of the Verandah) and saw their poverty and their self-mortification and said: 'Rejoice! for whoever of my community perseveres in the state in which ye are, and is satisfied with his condition, he shall be one of my comrades in Paradise.'" Among the Ahl-i-Ṣūffah were Bilāl b. Rabah, Salmān-al-Fārsi, Abū 'Ubaydah b. Al-Jarrah, Abu 'l-Yaqzān, 'Ammār b. Yasir, Abdulla b. Mas'ūd al-Hudhalī, his brother 'Utba b. Mas'ūd, Miqdad b. al-Aswad, Khabbab b. Al-Arrat, Suhayb b. Sinān, 'Utba b. Ghazwan, Zayd b. al-Khaṭṭāb, brother of the Caliph 'Umar; Abū Kabsha, the Apostle's client, Abu'l Marthad Kināna b. al-Ḥusain al-Adawi, Salim, client of Hudhayfa al-Yamani, Ukkasha b. Mihsan, Masud b. Rabī'u'l-Fārsi; Abū Dharr Jundab b. 'Amir; Abū Lubaba b. Abd al-Mundhir; and Abdulla b. Badr al-Juhani.

Shaikh Abū 'Abd al-Rahmān Muhammad b. Al-Ḥusayn al-Sulāmi, the traditionist of Ṣūfiism and trans-

mitter of the sayings of the Sūfi Shaikhs, has written a separate history of Ahl-i-Suffah, in which he has recorded their virtues and merits and names and "names of honour." He has included among them Abū Hurayrah, and Thaubān, and Mu'ādh b. al-Hārith and Saib b. Khal-lad, and Thabit b. Wadiat, and Abu Isa Uwaym b. Saīda, and Salim b. Umayr b. Thabit, and Abu 'l-Yasar Ka'b b. 'Amr and Wahb b. Maqal; and Abdullāh b. Unays, and Hajjaj b. Umar al-Aslāmi belonged to the Ahl-i-Suffah. Now and then they had recourse to some means of livelihood بَعْلَقَ بَهْسِبَتْ كُرْدَنْدَ but all of them were in one and the same degree (of dignity). Verily the generation of the same degree (of dignity). Verily the generation of the companions was the best of all generations; and they were the best and most excellent of mankind, since God has bestowed on them companionship with the Apostle and preserved their hearts from blemish.

A good deal of the pleasing account of the noble character and worthy actions has been related of each of the "Sahābahs" other than اصحاب الصفة (men of the Bench); but as the scope of the present discourse does not admit of elaborate descriptions, I shall, having given in brief a general sketch of the life and character of the Sahābah, now pass on to the other items which, owing to their supreme importance, deserve proportionately longer details. But let us, however, add here in brief a number of specimens illustrative of the thoughts and character of Sahābah in the earliest period of Islām. These might serve as examples to establish the origin of the aphoristic sayings of the saints of the later periods of Sūfic evolution.

(1) 'Umar b. Husain, for fear of Divine punishment, used to say: "I wish I had been a particle of dust and blown away by a gust of wind—I wish I had not been born!"'

(2) When the verse of the Qur'ān

وَإِنْ جَهَنَّمْ لَكُمْ عِدَّهُمْ أَجْمَعِينَ

"Verily 'hell' is the meeting-place of them all" was revealed, Salmān Fārsī, on hearing this, made a loud cry, put his hand on his head and ran off, and was not heard of for three days continually.

(3) Abū Dardā' says: "In the days of ignorance I was a merchant—afterwards when I embraced Islām, I wished to perform the business of trade side by side with the divine worship ; but finding that these two things cannot possibly be carried on simultaneously I adopted divine worship and left off trade."

(4) When Ummu'l Dardā' was questioned as to what was the best sort of divine worship practised by Abū Dardā', she said : "It was reflection and contemplation."

(5) Friendship of God has left no friend for me, and the fear of the Day of Judgment has left no flesh on my body, and the firmness of faith in the "ultimate reward" allowed nothing to remain in my house.

When once Ḥabib b. Muslīma sent him a thousand dirhams, he refused to accept them saying: "We have got sheep which we milk and an animal which we ride on, and what is more than this we do not need."

(6) Once a certain beggar asked something from Abū 'Ubaidah ; he refused to give him anything and sent him off. He again came and made a request. This time Abū 'Ubaidah gave him something and remarked: "It is God who gave you now, and it was also He who had turned you back disappointed."

(7) "How," said Abdullāh b. Mas'ūd, "these two disagreeable objects, i.e., Death and Poverty, are dear to my soul ; whichsoever of these things may be awarded to me first, I am contented with that."

(8) It is related from Anas b. Malik that on the Day of Judgment the first to arrive at the "Kawthar Spring" will be those lean and feeble persons who, in this world, are habituated to welcome the night as it comes, with anxiety and remorse.

(9) 'Abdulla b. 'Umar has related: "In the times of the Prophet, we unmarried, solitary persons used to sleep at night in the Great Mosque as we had got no house to live in."

(10) "To me," says Hudhaifah, "the pleasantest of the days is the day on which I go to visit my family and hear them complain of their poverty." He held that "one hour's indulgence in sensual pleasures subsequently involves a man in a long-drawn sorrow."

(11) It is said of Abū Fardā that once he walked for one mile, through all of which he missed to recollect God—he therefore turned and walked for another mile through which he maintained the recollection of God and on his arrival at the destined place said: "O Lord! forget not Abū Fardā, for he does not forget Thee!"

(12) 'Adī b. Ḥātim used to pulverize loaves of bread and fed ants with it, because he felt pity for them.

THE NATURE OF THE SAHĀBĀHS' SŪFIISM.

A number of comments have been made on Sūfism from different quarters, but the latent Sūfic reality, that is observable in the personality of the Sahābah and which can be set forth as an ideal of the true spiritualism and morality can be expressed in the words of Shāh Walī u'llāh thus:—

"To act upon the commands and prohibitions of Sharī'at is called *‘Aq* (action). But the position attached to the actions is that they must be productive of such spiritual qualities as are ultimately either beneficial or harmful to the soul, and at the same time it is necessary

that they should develop, explain and classify them and form their own selves their embodiment and structure. Such actions can be discussed from two distinct standpoints. One is that they may be universalized for all persons equally, of which the best process is that such opportunities may be selected and created that these actions may possibly be productive of those spiritual qualities. The method adopted must be so clear and unequivocal that it may make it possible to hold people, in cases of breach, publicly answerable for their conduct without leaving for them any chance of making false excuses.

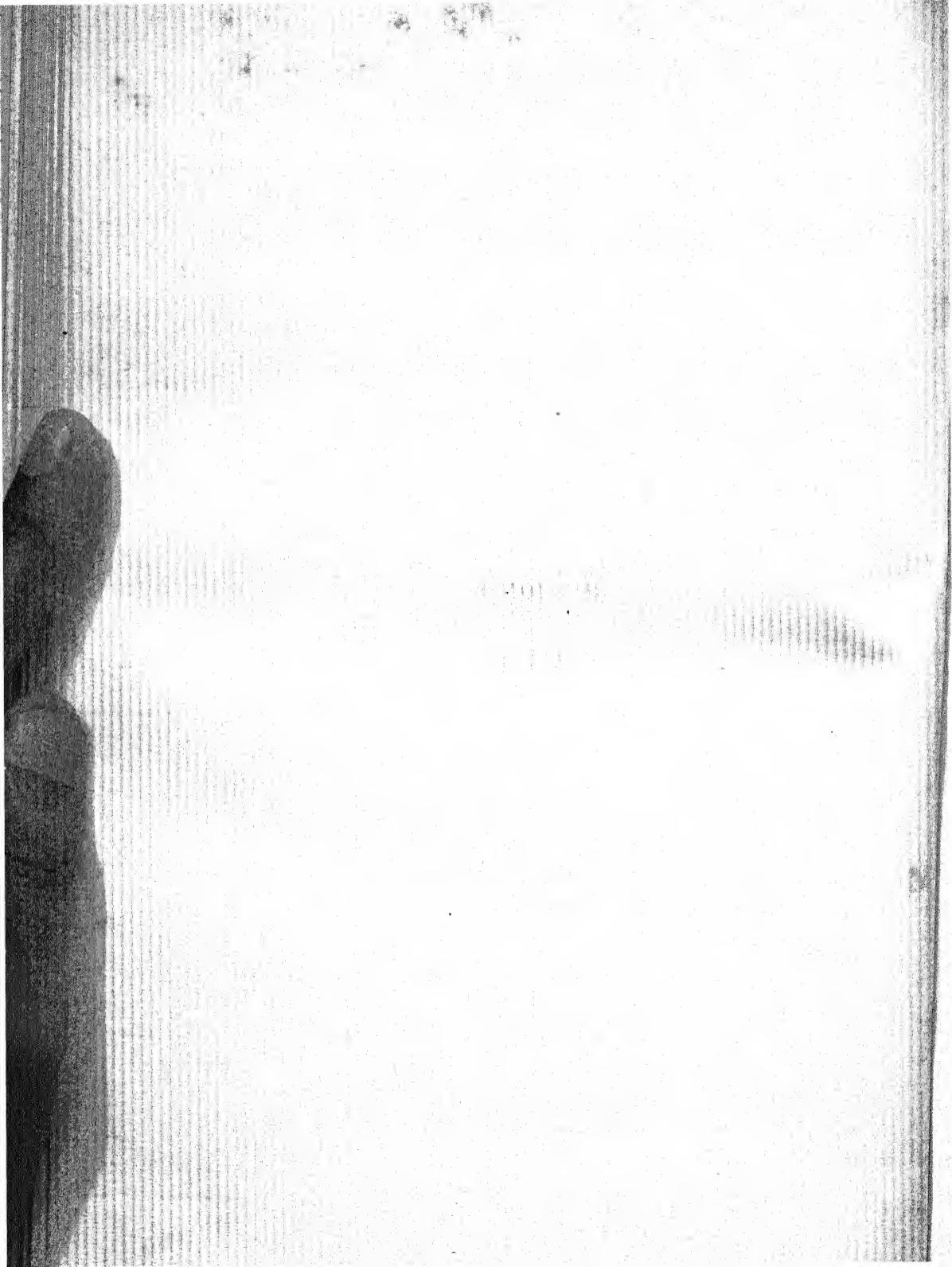
To secure this end it is necessary that they may be founded upon equality and moderation. Another process is that these actions may be employed as means to reform the morale of men and may be productive of those spiritual conditions which are required to be produced. The best way of doing this is to recognize first of all those spiritual qualities and then to point out and teach how these conditions can be made to produce such qualities. But this is based firstly on sound taste and secondly on the fact that they may be referred to the very founder of the Shari‘at, i.e., the Prophet. The knowledge that deals with it from the former point of view is called ‘Shari‘at,’ while that dealing from the latter one is known as علم الاحسان (Sūfism). Now those who want to study Sūfism must keep two objects specially in view: firstly, they must keep a careful watch over these actions to see whether they actually produce those spiritual qualities or not, for as often occurs, these acts are done either with the motives of hypocrisy or desire for fame, or as a special hobby or habit, and are tainted with the passions of vanity, hatred and malice. In such cases their object is very often lost, for they are performed mostly in such a way that the soul does not derive from them that kind of intellectual awakening as befits the position of a Sūfī. For example, the

man who performs his فرض (obligatory) prayers only without making any addition in its quality or quantity cannot be called Sufically 'an intelligent' man.

The next quality required is that they may themselves keep an observant look over those spiritual qualities, learn and understand them and perform actions through their own intention, so that they may become the reformers of their own soul."

SECTION V

URDU



MANFA'ATU'L-IMAN OF SHĀH BURHĀNUDDĪN JĀNAM

BY

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When I was on a short visit to Bījāpūr in July 1927, in search of MSS., Mr. Sayyid Muhammad Ishāq was good enough to present me with a MS. containing several valuable and unpublished treatises on religion and mysticism. My grateful thanks are due to him. One of the MSS. of this Collection is *Manfa'atu'l-Imān*, the text and translation of which, it is my endeavour, to publish in the following pages. As far as I am aware, the full text of this very interesting and in many ways important work, is seeing the light of day for the first time. A glance through the MS. will show that both from the point of view of language and the subject-matter it presents numerous difficulties in understanding it, and in places it is obscure and unintelligible. I have tried my level best in deciphering and translating it.

I should not fail to express my indebtedness to R. P. Dewhurst, Esqr., I.C.S. (Retd.), Professor B. D. Verma of Poona, and Mr. M. Naimur Rehman and Pandit Shri Narain Misra, both my learned colleagues at the University of Allahabad, for the valuable help they have rendered me by their very useful suggestions in translating certain passages of the text. If I have failed in any place in deciphering it correctly or understanding any line, I shall be grateful to the scholars interested in early Urdu poetry for their suggestions and valuable criticism to enable me to improve the translation in the next

edition. I may add that I propose to publish, in course of time, the whole of Jānam's works in separate book-form.

LIFE OF THE POET AND THE DATE OF THE POEM

I have already given a brief account of the life of the author and the date of the poem in my edition of the *Suk-Sahēlā* published in the *Allahabad University Studies*, Vol. VI (pp. 487—509) which may be referred to.

Regarding the characteristic features of the poet's work, I would again refer the readers to the pages cited above.

It will suffice here to say that as far as the language is concerned, the same features of the style and diction are found in the present work also.

Besides an English translation of the *Manfa'atul-'Imān*, I have also given a glossary of the important words occurring in the text, and I hope it will be found of some use and help to the readers.

THE ARGUMENT

God created this Universe out of His inward light. Man through his insensibility, and being dazzled by this world, does not understand the purpose of this endless Creation. Faith in God is the only key to understand the Absolute Being. The poet then proceeds to consider the position of those heretics who, not following the path of the Prophet (Muhammad), make guesses at truth according to their own perception and capacity. The postulates of God as air, fire, water, sound, light, mind and matter are then considered by showing the inadequacy of each. God is greater than any one of these and the guesses of the heretics are like the guesses of blind men who wanted to solve the mystery of the *whole* elephant by realizing only a *part* of it.

The poet ascribes the straying away of the heretics to their lack of faith and the tyranny of doubt. "They

know in part and prophesy in part." A man of faith knows that nothing could be created without a Creator. God is One and He has created the Universe out of nothing and can destroy it in a moment. There is no co-worker with God. The condition of peace in the Universe is evidence of harmony which was bound to be disturbed were there another king besides the One King ruling the Universe. These truths lie open to the believer. Those that are blind to it would also be devoid of sight in the next world. The need of a preceptor lies herein, because without such a one it is not possible to have a direct realization of God. Once a man knows the attributes of God from such a guide, he is bound to have faith in Him. He will then know that the evidence of the heretics is false and limited as they themselves are. The illusion of the senses has laid hold of them and they have forgotten the way of the Prophet and been led astray. Men are weak and God keeps Himself concealed; the guide whose vision is opened is the true guide, for he leads men upon the path of the Prophet, which is the path of truth.

THE TEXT AND THE METRE

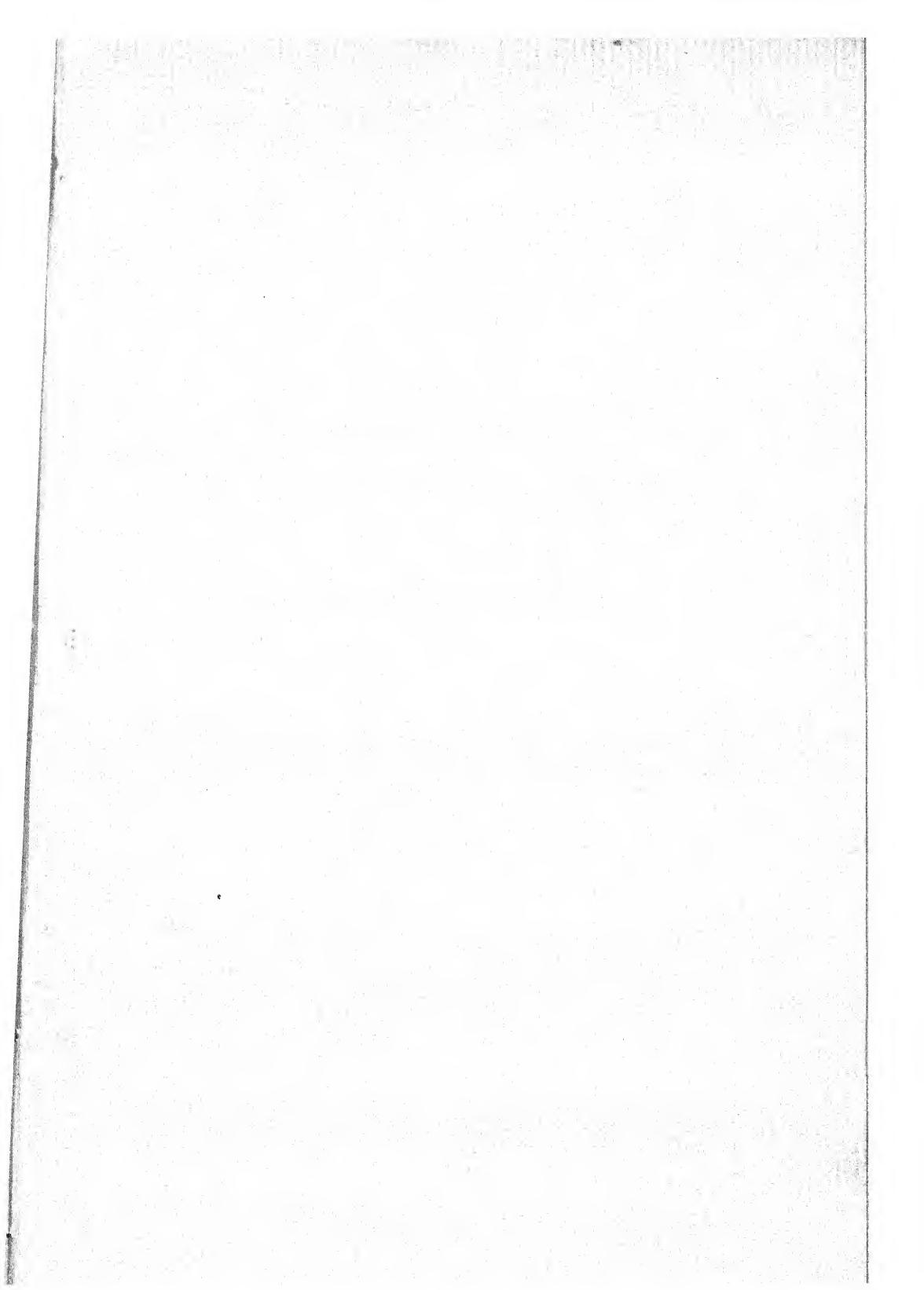
I possess only two copies of this MS. The one, which is written in *Naskh* and is a specimen of excellent calligraphy, I call A. It is my own copy. The second one is a faithful copy of another MS. in possession of Mawlawi 'Abdul Haq. It is written in the *Nastaliq*. I call it B. The result of the collation of the two is embodied in the present text.

The poem consists of 121 couplets and is couched usually in the metre *Mutaqārib* in the form *Athlam Maqṣūr*. It is therefore scannable as:—

Fa'lun	Fa'lun	Fa'lun	Fa'l
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The last Fa'l also becomes fa'āl in many places. On the whole the poet does not stick strictly to the metre.

In many places the last Fa'l becomes Fa'ūl. This is found throughout the poem and may courteously be called a license which the poet has chosen to make use of. There is throughout a possibility of misjudging the metre and only a strictly correct pronunciation of the words according to the modern Urdu usage will doubtlessly be misleading.



چیکر کریں لی اہمان
 جسیکوں ہر یا پھر اجڑا
 اسیں رجھنکوں روح شناک
 بعض اگر اگر عقل یہ
 مرجی خالی بیں بن سد
 بن عقل ب دھندا کار
 کوئی کریں سب عشق علم
 عشق لیا میس ب پیلے
 بعض اگر این لپٹے بیٹھے
 سب ایک جمع کریا بار
 کانٹا پھل ہانٹا پھل اور
 لیکھ کر راکھیں با
 ایک بھی بیج اپا ر
 کوئی کھین ید دیکھ نہ تھیم
 یہ سب عالم ای قدم
 ملا لوں

رسالة منفعت الایمان

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

- ١ - الله واحد سرجن هار
يہ جگ رچنا، چیا آپار
- ٢ - سگلا عالم کیا ظہور
اپنے باطن کیری نور
- ٣ - دیکھن چونڈی لا یا جگ
کوئی نہ سمجھے اُس نے لک
- ٤ - غفلت کیتا بردہ آڑ
سب جگ لینا اُس میں ناز
- ٥ - بہتوں خالق^۲ کیا بچار
بھولیا سب جگ غفلت مار

نَعْمَتْ مَكَاهِدْ مُصْطَفَى صَلَى اللَّهُ عَلَيْهِ وَسَلَّمَ

- ٦ - نبی کیری بھولی را^۱
ون، میں تھوڑے حق آکا
- ٧ - جس کوں ہوے ارادت حق
تو وہ تجویہں، حق مطلق

^۱ B: جگ دو، ^۲ بوجہ، B: ملت، B: امنیں، B: ملت.

دوبیان، اعتماد ملحدان

- ۱ - ملحدان کی ایسی بات
خدا پیچھا نی کیتی دھات
- ۹ - وہ بھی کہہ سوں تجھہ معین
پر گت بولوں دیکھیں عین
- ۱۰ - کوئی^۲ یک آکھیں عین ہوا
آپس پر لے کرپس دوا
- ۱۱ - وہ کون ہوا دیکھہ اُس میں
رچنک جگ کی ہے جس میں
- ۱۲ - بے روپ دستا خالی ہوے
آس بن دوجا ناہیں کوئے
- ۱۳ - جو تھا خالی کیا اعتبار
یہ بوجھہ خالی بھول^۱ بچار
- ۱۴ - بعض آکھیں باو سروپ
جس تھی حرکت سب بے روپ
- ۱۵ - اس بن ذرا نہ ہلتا کچھہ
ایسی گواہی لیاویں پچھیہ^{۱۱}
- ۱۶ - اکھنڈ بارا پکڑیں ایک
جس ہوا میں محیط دیک^{۱۲}
- ۱۷ - اُس کا برتاؤ بے دم بھاؤ^{۱۳}
بھی گھٹ چھوڑیں وہاں سماو
- ۱۸ - بعض آنکھیں بوجھہ اگن^{۱۴}
اُس تھی اور نہ آکھیں چن^{۱۵}

^۱ So in B, A has no heading here.

^۲ A. has for آکھوں B. omits this couplet.

^۳ جو گما دوجا ہیں B. has instead of بھاونا A. بھاونا

^{۱۰} A. باو B. دیکھہ پوجھہ A. بھاونا B. بھاونا

^{۱۱} A. بھاونا

- ۱۹ - وہ کون آگن پکریں آپ
جل تھل میں سب رہیا بیاپ
- ۲۰ - جیتنا جس تھی روشن سب
سگلا بھوگ اور روپ سب
- ۲۱ - یہ سب دیسے آگن کلا
ایسا آکھیں گیاں بھلا
- ۲۲ - بعض آکھیں ہے سب جل
ندین پانی دو جا پھل
- ۲۳ - اُس تھی^{۱۸} اُپتھے سب کھان
جیتا رچا دھرت مندان
- ۲۴ - وہ کون پانی بوجھہ سماو
جے سب سیندل پکڑیا بھاوا
- ۲۵ - بعض آکھیں سب الحان
سن میں دیوبین^{۱۹} اپنے کان
- ۲۶ - نہ کچھ مقصود بن اوڑ
اس بن جیتا سب ہے باز
- ۲۷ - قران تفسیر اور کتاب
جیتا قول ہے سوال جواب
- ۲۸ - محیط سب میں دستنا ناد
بن اُس بوجھیں سب ہے باد
- ۲۹ - بعض آکھیں جھرم جوت
اوے^{۲۰} نہ^{۲۱} جاوے نا اُس ہوت
- ۳۰ - ان کے نظروں ذہیں ظلمات
سورج نکلیا جیسا دلت

^{۱۸} A has دھرے

^{۱۹} A has ئ before اوے. The writer has apparently missed the beauty of the idiom without ئ.

^{۲۰} B. ۶

F. 81

^{۲۱} A has ڙ for تھی

- ۳۱ - وہ^{۱۹} ہی جس کے سب گھٹ جیو
اُس بن دوجا ناہیں پیو
- ۳۲ - آن کی نظرؤں یوں ۵ سے
سب^{۲۰} میں پرکاش جوت بے
- ۳۳ - بعضے کیرا^{۲۱} یوں فہماں
سننا دیکھنا جیتنا کام
- ۳۴ - بولنا چلنا حرکت تن
سینے بھیتر جی ہے من
- ۳۵ - ایسا پرچو را کھیں دیتھے
گیان نظر تھی گذری بھیتھے
- ۳۶ - بعضے آکھیں تن موجود
تن میں^{۲۲} دوسرا دیکھہ وجود
- ۳۷ - ہوئے کنارے اندر خواب
نا کچ اُس بن دوجا^{۲۳} خواب
- ۳۸ - ھوا خمس سب اُس کے سات^{۲۴}
تن میں حرکت جیسے دھات
- ۳۹ - گھٹ گھٹ ایسا ہے موجود
تن ہے عابد وہ معبوو
- ۴۰ - بعضے آنکھیں جیو لطیف
اُس بن جیتا سب کثیف
- ۴۱ - وہ ہی ۷۰^{۲۵} جو آئے ذات
بعضے جانے کل صفات

^{۱۹} For the word چنکی وہی چنکی B. reads وہ ہی جس کے probably a misreading for چن کے or better چن کی.

^{2۰} B. has سب for سب. It is very probably a misreading for سب سب

^{2۱} A. آکھیں ^{۲۲} A. omits it. ^{۲۳} B. اور

^{2۴} B. ساتھ ^{۲۵} A. کیف

^{2۶} B. has جو for جو اور جو. I have preferred جو as yielding better meaning an جواہر

- ۲۲ - جیو کوں بھی نا پورا جان
چپکے پکریں لے^{۲۷} آنمان
- ۲۳ - اُس میں جن کوں دوح شناس
وہ بھی آکھیں یوں رہ داس
- ۲۴ - بعض آکھیں عقل یہی^{۲۸}
جس تھی نیک بد ہوا صحی^{۲۹}
- ۲۵ - ہر جیو خالی نیں^{۳۰} بن سد
ہر یک آپس پرتھی^{۳۱} بد
- ۲۶ - بن عقل سب دھندا^{۳۲} کار
اُس بن ناکس دینہ^{۳۳} قرار
- ۲۷ - کوئی کھیں سب عشق تمام
عشق کے انگیں^{۳۴} کیا ہے فہام^{۳۵}
- ۲۸ - عشق لیا ہے سب پر باس
عشق تھی سگلا بھوگ بلاس
- ۲۹ - بعض آکھیں اپنے بوجھہ
معلوم نیں^{۳۶} کچھہ اُس کی سوجھہ
- ۳۰ - سب ایک جمع پکڑ یا بار
جون کے بیچ تھی نکلیا جھاز^{۳۷}
- ۳۱ - کانتا بھانتا پہل اور پھول
شاخ برگ سب دیکھہ وصول^{۳۸}

^{۲۷} B. یہ

^{۲۸} صعی in the sense of the Arabic صَحِيفَ has been so written to rhyme with بھی in the first hemistich.

^{۲۹} دیکھیں A. ^{۳۰} ب. پرتوی. ^{۳۱} دھندا کار. ^{۳۲} نہیں. I have adopted. in preference to دینہ as دینہ is more appropriate with Deccani idiom.

^{۳۳} آنکھیں B.

^{۳۴} A. قام. ^{۳۵} A has it in a different order. The adopted reading yields better sense ^{۳۶} معلوم اوس کے نیں سوجھہ A. اصول B. جھار.

- ۵۲ - ایک جمع کر را کھیں بار
بیچ پنے کا ناہیں تھا
۵۳ - ایک بیچ^{۳۸} بیچ آپار
بیچ پنے سوں سگلا جھاڑ
۵۴ - کوئی کھیں یہ دیکھہ مقیم
بے سب عالم اھے قدیم
۵۵ - نا اس خالق مخلوق کوئی
جیسا تیسا سمجھیں^{۳۹} ہوی
۵۶ - ذہپیں ایکس^{۴۰} تھی یہ سب بار
ذہ کچھہ سب تھی ایکس تھا
۵۷ - صورت صورت جنس جنس
رنگ تھی (رنگیں^{۴۱}) کنس کنس
۵۸ - ایسا سمجھ سمیہ ملا آد
اُس کوں نا ہیں آد بنیاد
۵۹ - بعض آکھیں یہ سب جھوت
یک یک انگوں ہر یک بھوت
۶۰ - یہ سب اندھیاں کیوی دھات
ھاتی لا گیا اُن کے ہات
۶۱ - جوں انگ پکڑ یا جیسا جن
ویسی مت لی اٹھیا تن

در بیان نصیہ دمت

- ۶۲ - جیتا سگلیاں کا گفتار
جمع دیکھیں اپنے تھا
۶۳ - جس^{۴۲} دھات آکھیں ایک ملا
تو اُس آکھیں گیاں بھلا

^{۳۸} B. بیچیں.

^{۳۹} B. سمجھوا.

^{۴۰} A. بیکس.

^{۴۱} B. رنگ ہیں.

^{۴۲} B. Omits this couplet.

۶۳ - کنندھنی^{۴۳} بدفی سب نواز

دھندا^{۴۴} تیں ناہیں کچھہ بچار

۶۴ - جن جن جانیا جیسا ہوے

بھل تس بدھوں سمجھہا ہوے

۶۵ - جھوٹ سچ کھنیں کس نہ آئے

ایک دھات پکریں ناکوی^{۴۵} پائے

۶۶ - یہ سب ملحد قوم بچار

ایمان ناہیں ان^{۴۶} کے تھار

۶۷ - یو سب غافل ہیں گمراہ

ان پر توں اعتبار نہ لیا

۶۸ - نبیان ولیان کا نیں^{۴۷} یو گیان

یو سب بھولے پکڑ گمان

۶۹ - پنہاں را کھے ان تھی ان

یوں نا باہے کس نے من

۷۰ - یک قتل نا بیس ان کے پاس

ان کوں دیکھت جا نا ذہاس

۷۱ - یو سب چھوڑیں قوم عوام

خاصوں کیرا دیکھہ فہام

۷۲ - دو جوں^{۴۸} بوجھیں اپنا رب

جس تھی رچنک عالم سب

۷۳ - قدرت کمال پر تھی جان

کوی^{۴۹} یک کوتا ہے کر ہمان

۷۴ - بن کئیں کچھہ کاج ذہیں

عالم کرنی باج ذہیں

^{۴۳} دھنڈتے ^{۴۴} وان A. ^{۴۵} تھنی B.

^{۴۶} B. omits it.

^{۴۷} yield no relevant meaning.

^{۴۸} B. omits ^{۴۹} آنخوب These two words

^{۴۹} B. omits ^{۴۹} و

- ٧٦ - جیتا مخلوق دیکھہ تمام
شریک ناہیں اُس کے کام
- ٧٧ - ایسی رچنک دیکھہ آگاد
نہ ہت کس کے اوے صاد
- ٧٨ - ایکس تے نہ سب جگ مل
قدرت میانی نیں داخل
- ٧٩ - نیں میں کیتا جگ میکن
نہ پید کرنی لگے نہ چہن^۱
- ٨٠ - نہ ایک پنے تھی اکلا ہوئے
ذہیں پنے تھی کیا کم جوے
- ٨١ - جیسا^۲ ہے یہ ویسا نیں
اُس نا شریک دوجا کیں
- ٨٢ - ایسا مالک وہ یک ہوئے
ملکت ناہیں دوجا کوئے
- ٨٣ - جے اس شرکت ہوتا اہ
ہوتا کل جگ مانہ فساد
- ٨٤ - جے^۳ یک شہ پر دوجا اور
تو اس غوغما اکلا شور
- ٨٥ - گدھے ملک تھی امن امان
حاکم حکم یوں کرتا جان
- ٨٦ - حاکم کیری حکمت میں
دیکھہ فہم کر عظمت میں
- ٨٧ - سب بہ جانے کوی در زور
یقین ثابت لیاویں^۴ اور

^۱ ب. کہن^۲ A. has it differently
^۳ نیں A meaning "if" yields better meaning in keeping with the context than "نیں"^۴ ب. لیاویں در

۸۸ - یوں نا یقین کریں ثبوت
وے تو اندھے دیکھن کوت

۸۹ - یقین کیری اندھے کوے
اس جگ اندھا اُس جگ ہوے

۹۰ - رس بس روپ ناد آتیت
امس نہیں وہاں دیکھیں چیت

۹۱ - ہوا خمس تھی دیکھہ بھار
ایسا آنہو کریں بچار

۹۲ - اور باطن کا وہم نوار
غہم وہم تھی دیکھن بھار

۹۳ - چج^۴ باطن روپ خیال
وہم تیرا سب غفلت گھاٹ^۵

۹۴ - کیسا^۶ تو کس بد ہو انجن
صوشد کی مکھہ ساز بیجن^۷

۹۵ - ملحدان کے^۸ یوں ادراک
سب تھی دیکھہ^۹ منزہ پاک

۹۶ - وہ سب شاهد عالم کا
مالک وہ جگ سالم کا

۹۷ - شروپ فردھار روپ بسے
سب^{۱۰} کا ادھار وہی دیسے

۹۸ - قدرت سوں کر سب جگ زیر
جون اُس بھاوے دیوے پھیبر

۹۹ - ایسا بیچ چکونہ جان
اُس پر نہ^{۱۱} لیا وے^{۱۲} کون ایمان

۱۰۰ - بن اُس لوزتی^{۱۳} ہے مشکل
روشن کرے جس کا دل

^{۸۴} A. puts it in a different form: چے باطن کا چج روپ خیال

^{۸۵} B. omits تو کس بد خیال

^{۸۶} ب جگ دیکھیں B. کیں پائے بوجوں A.

^{۸۷} ب جگ دیکھیں B. omits it.

^{۸۸} ب جگ دیکھیں B. omits it.

- ۱۰۱ - ملحد کی وہ جھوٹی گواہ
کہ خود قیاس اس پر لیاہ
- ۱۰۲ - اُس کوں اپنے لیاوے قید
اُس کا جانے نا کوئی بھید
- ۱۰۳ - اپنا اپنا یک یک انگ
تاویل لیاویں بہتوں دنگ
- ۱۰۴ - نفس کی گھری پکڑی بھول
آخر وہ کیوں پڑی قبول
- ۱۰۵ - راء^۴ نبی نے بھولے وہ
مارگ حق تھی دولے وہ
- ۱۰۶ - ایسا بھلا کریں بچار
تو بت لے کر ہو ہشیار
- ۱۰۷ - لا حول بھجیں توں سو بار
آن تھی سن کر^۵ ہو بیزار
- ۱۰۸ - یوں سب بھولے غافل لوگ
ایسا گیان یو خالی پھوک
- ۱۰۹ - ملحد کی بد لئیں نہ گُن
غفلت کی^۶ نا باھیں من
- ۱۱۰ - جس کوں توفیق اُس تھی ہوے
اُس کے کوہیں سماجے کوے
- ۱۱۱ - یوں^۷ سب بندے ہیں اذکار
جس وہ ابوی^۸ ایمان
- ۱۱۲ - ایمان دیوے جسے عطا
وہ کیوں جاوے دیکھہ خطرا
- ۱۱۳ - ولی نبی کے سب اقوال
سمجھیا ناہیں وہ کس حال

^{۴۴} B. omits راء نبی^{۵۵} B. میں^{۶۶} B. منکر^{۷۷} B. بھوک

- ۱۱۳ - آن بولوں پر تھی^{۶۸} ہو مرتد
 راہ حقیقت تھی ہو^{۶۹} بد
- ۱۱۴ - بوجھیں^{۷۰} ناہیں راہ سلوک
 غفلت راہ لگ بھولی^{۷۱} چوک
- ۱۱۵ - مرشد پورے^{۷۲} راہ نما
 تو یہ^{۷۳} بوجھیں خوب عیان
- ۱۱۶ - ذہیں تو پھر بھر بھنوئے بھان
 بول بکار میں سر گردان
- ۱۱۷ - جس کے دل پر کھولے^{۷۴} نظر
 آس یہ کھولیں سب پدر
- ۱۱۸ - اللہ را کھے غفلت تھی^{۷۵}
 آپ دیکھایے قدرت تھی
- ۱۱۹ - بندے سگلے ذاتوں
- ۱۲۰ - اللہ را کھے آپ پنہاں
- ۱۲۱ - یوں فرمائے شاہ برهان
 اس میں آہے^{۷۶} نفع ایمان

^{۶۸} B. omits it.

^{۷۰} A. بھے

^{۷۲} B. بوڑی

^{۷۴} B. ہوئے

F. 62

^{۶۹} B. رہ

^{۷۱} B. بھول

^{۷۳} A. وہ

^{۷۵} B. آج

TRANSLATION

In the name of God the most compassionate and the most merciful.

1. The one God is the creator (of this universe); His creation of this world is endless.
2. Out of His inward light He manifested all this world.
3. To look on this universe is to get dazzled ; and none understands its purpose.
4. (Our) forgetfulness has thrown a veil (in front of us) and the whole world abides in it.
5. Many people have thought over the nature (and existence) of the creator ; but the whole world is unmindful of Him on account of negligence.

Alternative translation is also suggested :—

(But) many have meditated on the creator (while) the world at large has been forgetful, being struck with stupor.

In praise of Muhammad

May God's benedictions be on him.

6. Among those who have forgotten the path of the Prophet (Shariat) there are few who have divine knowledge.

7. Only those who have devout faith in God are capable of understanding the Absolute Being.

ON THE FAITH OF THE HERETICS

8. How shall we know God, say the heretics ?
9. Come unto me and I shall tell it thee definitely, I shall speak out and make it perfectly plain.
10. Some people come and say that God is essentially the air : they judge according to their own understanding.
11. What is that air, consider it well, which has the power to create a universe ?

12. It looks formless and is empty—there is nothing other than that.
13. That which was without substance you believed in this guess in vain, this thought mistaken.
14. Some people say that it is like the air and all this phenomenal world is the result of its vibrations.
15. Without it not a particle moves. Such is the worthless evidence they (people) produce.
16. There are others who having seen it pervading everywhere consider it indivisible.
17. The breath is its reflection. Leaving this body it fills another space.
18. Some people say that it (the Absolute Being) should be taken as fire except that they find no other manifestation.
19. What is that fire? They take it to remain pervading in earth and in water.
20. It is on account of it that everything shines : all the means of enjoyment and the forms (of things).
21. All this is visible through the trick of the fire. This is also an assertion of (some) learned men.
22. There are some who say that water is all in all. There is no product other than water.
23. All this great abundance has been produced by it ; and all this created earth and the universe also.
24. What kind of water is that? Take it to be something which is always in a level from which all things have acquired their (intrinsic) cold properties.
25. Some people say that sound is all in all ; and they pay attention to that which is heard.
26. Everything is purposeless without sound. Without it everything that exists is mere play.
27. The Quran, the exegesis and all that has been said (in) books is question and answer.

28. Pervading all things appears sound. Without it everything is wind and vapour.

29. Some say that a glimmer of light is (the source) of all (being) which neither comes, nor goes, nor does it die.

30. In their eyes there is no darkness. To them the rising of the sun is as good as the night.

Alternative translation of the second hemistich :— It is all one (to them) whether the sun shine or it be night.

31. It is that (light) which is life in every being (body) except that there is no other adorable object (Lord).

32. In their eyes it appears thus : the ray of light dwells in all.

33-34. Some people come and say : Understand it thus—hearing, seeing and all action, speaking, walking, bodily movements and all that is within the breast is mind.

Alternative translation :—

There are others who are of opinion that our hearing, seeing, speaking, walking and the bodily movements, (in fact) all our actions are due to the mind which dwells in our heart.

35. True wisdom has passed beyond the ken of those that have such knowledge and vision, without meeting it.

36. Some people say that the body is the present (existing) reality. Look within and see in the body another existence.

37. It is that which recedes during sleep. Except this there is no other answer.

38. The breath and (the exercise of) the senses all go with that (another existence). The body has as much motion as the minerals.

39. In every body that is present. The body is the worshipper and that (other existence) is the object of worship.

40. Some say that the soul is the finer (existence) and except it all else is coarse.

41. That alone is the real substance—the pure being; others think that He is “all-attributes.”

42. They do not know the soul perfectly, they only make guesses (at truth).

43. Even those who believe in soul also point to the same right path.

44. Some people say that reason which discriminates between good and evil is all in all.

45. No person is devoid of sense. Every one argues (according to) the extent of his own reason (knowledge).

46. Without reason everything appears chaotic; in its absence nothing could be known.

47. Some people think that Love is all in all. What is understanding in presence of love?

48. Love dominates everything : all our enjoyment of life is due to love.

49. According to their own understanding some people aver that they do not know, nor have they a vision of the (source of being).

50. A great multitude of things lay concentrated in one place like unto a seed out of which comes forth a tree.

51-52. Thorn, fruit, flower, branches, leaves and all other products are collected together in a heap ; no one can discern what their state was in the seed.

53. In one seed are seeds innumerable and from every seed emanates a whole tree.

54. Some people while observing this solid seeming earth allege that it is eternal.

55. This world has no creator nor has it been created. In the nature of things it is what it is.

56. There is no unity in this diversity (multitude), nor was this multitude concentrated together in one place.

57. Everything has its own shape and form : colour comes from colour, as ears of corn from corn.

58. This natural phenomenal existence is eternal. It has no beginning and no foundation.

59. Some people (contradict it) and say that all this is untrue. Each one of us knows only in part and quarrels over it.

60. All this is a blind man's guess who has come into touch with an elephant.

61. The elephant is to him of the form of the limb which he catches hold of and he forms his opinion accordingly (of the body of the elephant).

ON PRECEPT

62. All that men assert they find collected and contained in their own view.

63. If anybody discovered one element to be the source of being then he thought that he had found true knowledge.

64. They have tied a cord round their neck, i.e., they have stifled themselves (as a matter of fact) they do not search (closely) nor do they ponder (sufficiently).

65. Everyone understands according to his own capacity; that is good which one has understood through the exercise of his intellect.

66. No one knows how to distinguish between true and false. No one can get at truth by simply fixing his attention only on one element.

67. This is the view of a sect of heretics : They are devoid of faith.

68. All these people are forgetful, and have strayed away. Have no faith in them.

69. This is not the wisdom of the prophets and the saints. They have been led astray on account of their doubt.

70. They keep secret their (scepticism) from others, and it is agreeable to none.

71. They have no more than a particle of knowledge : to look on them is to find them hollow. An alternative translation is also suggested by Prof. Verma. They have only one good analogy at their disposal. When you look at them you find them empty. It depends on how the word ﴿ ﴾ is read. If ﴿ and ﴾ are read as one word then it means analogy. If it is read separately (as in the latter case) then it means an iota, a particle.

72. The common run of men leave off all this (belief) as soon as they understand the thought of the chosen few.

73-74. Those who believe in their God who is the creator of all this world (they) realize His glory and power ; but very few do so in full faith.

75. Nothing is done without doing : it is not a play to create a world.

76. All the creatures that you see, not one of them shares in His acts, i.e., He creates this world without anybody's help.

77. Look at this endless world : no one is truly able to design it (as He does).

78. Not only one but the whole world united, could interfere with His omnipotence.

79. Out of nothing He has brought the world into existence and it would not take Him even a moment to destroy it.

80. Though only one, He is not alone. Non-entity does not take away anything from Him.

81. For Him existence and non-existence is all the same. There is none other that shares (His power).

82. Such a Lord is only one. There is no other being who is co-worker with Him.

83.* If there were anyone like unto Him from the beginning of time, there would have been great confusion in this world.

84. If there were another (King) over the one King there would be great confusion and anarchy.

85. Thus peace and harmony would pass away from his (dominion); this is how He has ordained.

86. Look into the wisdom and greatness of the Lord with understanding.

87. There must be some powerful Being (ruling over) all the subjects—(to this effect) they bring forward convincing proof.

88. Those who do not believe in proof they may be looked upon as blind.

89. Regarding a man blind in faith it may be said that he who is blind in this world he would also be devoid of sight in the next world.†

90. (In that region) beware, O wanderer (at it), there is neither taste, smell, form, sound, mind, nor touch, nor sight.

91. He who steps out (the region) of five senses (deliberately) such (an act) is considered direct apprehension.

92. Having inhibited inward fancy, they (try) to (realize Him) outside the (range) of (mental) understanding and apprehension.

93. Renounce thy inward form and fancy and cast away thy imagination.

* This is almost a literal rendering of the Qoranic verse.

لَوْ كَانَ فِيهِمَا آلهَةٌ إِلَّا لَنْ يَكُونُوا

"If there were in them (heaven and earth) two Gods besides Allah they would have quarrelled (among themselves).

† Of. the Quran

وَمَنْ كَانَ فِي الْأَرْضِ أَعْصَى نَفْسَهُ فِي الْأَخْرَةِ أَعْصَى وَأَشَدَّ سَيِّئَاتِهِ

He who is blind in this (world), he is more blind and astray in the hereafter.

94. What an ignorant fellow thou art. (Seek) some wise men. Thou shalt attain thy aim only through thy devotion to thy Guide.

95. This is the perception of those who believe in the unity of God. They see Him free from all contamination.

96. He is the beloved of the world and the Lord of the whole universe.

97. He dwells in His formless, supportless shape. He appears to be the supporter of all.

98. (By virtue of) His power He has subdued the whole world. He can turn it into any shape He likes.

99. Knowing Him to be such a matchless one who is there that would not have faith in Him ?

100. It is difficult (to accomplish) anything without God by whom our heart is enlightened.

101. That evidence of the heretics is false which they have furnished out of their own surmise.

102. The heretics put on their own limitations upon Him. No one knows His secrets.

103. Everyone has his own views and he interprets them in many ways.

104. The illusion of the senses has laid a hold on them (one wonders) why they have accepted (such a position).

105. They have forgotten the way of the Prophet and have gone astray from the Divine Path.

106. It would be to their interest if they think like this. They can become watchful after repentance.

107. They imprecate thee hundred times (so much so) that when thou hearest them thou gettest disgusted with them.

108. The negligent ones have forgotten all this. Such wisdom is nothing more than mere dregs.

109. Do not accept either the wisdom or the virtues of heretics. They let their minds remain in ignorance.

110. He who is endowed with Divine grace he alone is capable of understanding His doings.

111. Ordinarily the people of the world are ignorant except those who are granted faith by His grace.

112. Why should one go knowingly wrong if He has bestowed faith upon one ?

113. Woe be to the man who does not understand the sayings of saints and prophets.

114. He who does not put faith on those sayings strays away from the path of truth.

115. They do not understand the Path of aspirants having completely forgotten the way on account of their utter negligence.

116. Taking the teacher as a perfect guide they can realise the meaning of the path clearly.

117. Otherwise they are hovering about like large black bees perplexed in forgetfulness and vice.

108. He whose inward vision is opened, from such a one all veils of restrictions are removed.

119. May God keep us away from negligence and may He show (the way) of His own accord.

120-21. All the men are weak ; and God keeps Himself concealed.

Thus has Shāh Burhān said. In this alone is the benefit for one's Faith.

GLOSSARY

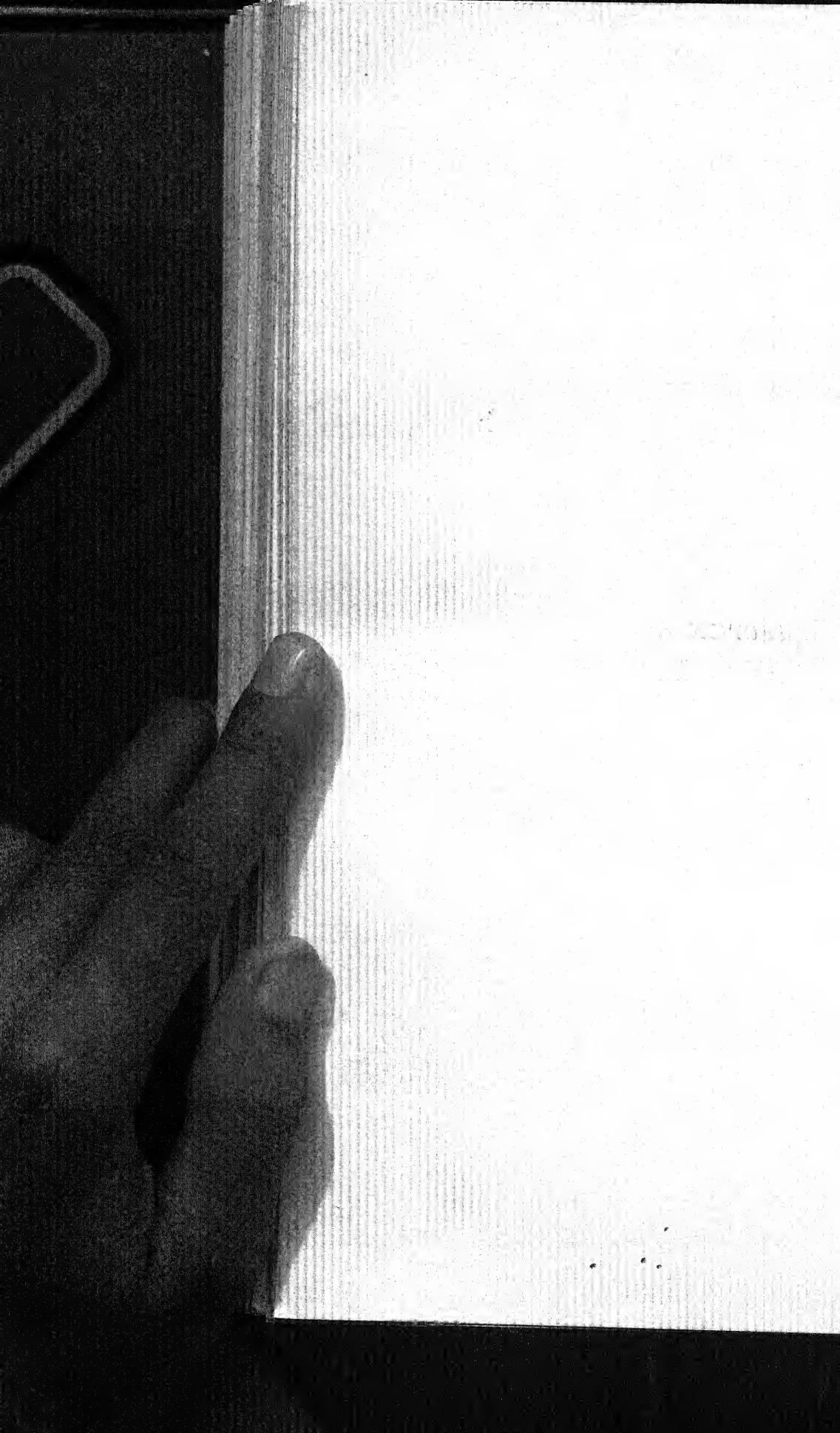
Dakh.—Dakhani
Pers.—Persian
Hind.—Hindi

Sans.—Sanskrit.
Arab.—Arabic.
Marh.—Marathi.

اپر— <i>apār</i>	(Sans.) Endless.
اپتھ— <i>utpat</i>	(Sans.) Creation.
اڈ— <i>ād</i>	(Sans.) Beginning.
اڈھار— <i>ādhār</i>	(Sans.) Support.
اکھاند— <i>akhand</i>	(Sans.) Indivisible.
اکھون— <i>ākhūn</i> .	Verb indefinite I say, from اکھنے— <i>ākhnā</i> (to say). not in use in modern Dakh. which has اکھٹن کاہٹن (Urdu کاہٹا ہون). Panjabī: اکھون.
اگاد— <i>āgād</i>	(Sans.) Limitless.
آن— <i>an</i> .	Another.
انجن— <i>āngen</i>	modern انجن In presence of.
اک پانے— <i>ek pane</i> .	The being one, unity.
باج— <i>Baj</i> (from Pers.)	بازی— <i>bazi</i> —Play.
بار— <i>Bar</i> (Sans.)	Multitude ; heap, herd.
بھائی— <i>bāhi</i> .	Agreeable.
بود— <i>bud</i>	(Sans. <i>buddhi</i>) Reason.
بکار— <i>Bikar</i> (Sans.)	Vikara. The change of any from its original state, deterioration, disease.
بھل— <i>būl</i> .	Corrupt of Dakh. <i>bhūl</i> —Forget- fulness.
بھار— <i>Bhār.</i>	Out, Outside.
بھال— <i>Bhal</i>	Well, good.
بھوگ بیلاں— <i>bhog bilās</i> .	Enjoyment.
بھٹے— <i>Bhet</i>	(Hind <i>bhent</i>)—Meeting.
پادار— <i>Padar.</i>	A fold, an end of a cloth.
پارچو— <i>Parcho</i>	(Hind. <i>Parchai</i>)—Realization, Knowledge.
پارگھات— <i>Parghat</i>	(Sans.) Apparent, clear.
پوچھ— <i>Pūchh</i>	(Pers. <i>Pūch</i>) Worthless.
پوک— <i>Phok</i>	(Hind.) Dregs, sediment, hollow.

तिल— <i>Til</i>	(Hind.) A particle.
तुलना— <i>Tulna</i> .	(Sans.) Analogy, Comparison, lifting, weighing.
थार— <i>Thār</i>	Near.
जोत— <i>Jot</i>	(Sans.) Light.
झुरमुर— <i>Jhur Mur</i>	Twinkling of light. Cf. Hindi झुल्ला Jhilmilna to twinkle, to scintilate.
खाम्स— <i>Khams</i> .	Five. Here signifying the five senses.
दाता— <i>dhāt</i> .	(Sans.) The ore, mineral, way, method, mode.
दूजा— <i>Dūja</i> .	(Sans. <i>ditiya</i>) Second, Another.
दीध— <i>dīth</i> .	(Marathi from Sans.) Vision ; sight, glance.
सर्जन— <i>Sarjan</i> हर (Hind.)	Creator.
सामाँ— <i>Samā'ō</i>	(Sans. <i>Sama</i>) Room, space (S.).
सूझ— <i>Sūjh</i>	Sight.
सहज— <i>Sahjen</i> .	Naturally.
कल— <i>Kal</i>	(Sans.) A trick, skill.
गंठनी— <i>Kanthani</i>	Cf. Ganth, gala (the neck). A neck.
कान्स— <i>Kans</i> .	An ear of corn(?).
खान— <i>Khān</i> .	A mine ; metaphorically abundance, profusion.
कारी— <i>Kairi</i>	Of.
गहाल— <i>ghāl</i> .	Mischief.
घाट— <i>ghāṭ</i>	(Sans.) body ; the heart.
लक— <i>Lak</i> .	(Sans. <i>laksh</i>). Purpose objective, goal.
लोरी— <i>Lori</i>	God(?)
मान— <i>Mandān</i> .	The Universe.
नाद— <i>Nād</i>	(Sans.) Sound.
निर्धार— <i>Nirdhār</i>	(Sans.) Supportless.
निरूप— <i>Nirūp</i>	(Sans.) Formless.
नाहिन-पाना— <i>Nahin-pānā</i> .	Non-entity.
वर्षूर— <i>Warṣūr</i>	Powerful (?)

SECTION VI
HISTORY



PROBLEMS OF SUCCESSION IN THE MOGHUL DYNASTY

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PART I

The problem of succession is very intricate. Whether the eldest son alone is entitled to rule or every son of the deceased ruler has some share in the kingdom, whether the nomination of a dying Emperor is enough to ensure the succession of the nominee or is there any necessity of selection or approval by the notables of the realm, whether the kingship can be challenged during the lifetime of the ruler by any of his sons, or has the grandson any right to be preferred in comparison to his father, these are some of the baffling questions which one meets at the very outset.

It is difficult to answer any one of these questions without taking into account all the forces of thought that had been operating on the 17th century India. This unsettled, intricate problem of succession was made more so by the different systems of thought on the question.

Babar was descended from a Mongol mother and a Timuride father. He had imbibed both the cultures. Apart from these two, he had the Islamic culture as his background. The dynasty that he founded in India could not ignore the system of thought that already existed here. Mohammadans had been ruling in India long before Babar's advent. The result of five hundred years was not nugatory.

All the various dynasties of Slaves, Khaljis, Toghlucks, Sayyids and Lodis had something to give on any, all or some of the questions of succession detailed above. The Muslim theory of kingship owes a good deal to the institution of the Caliphate. In discussing the problem of succession a reference, now and then, will inevitably be made to the principles that regulated the succession among the long line of the Caliphs.

Let us take the first question, whether the eldest son alone had the right to rule or were all the sons entitled to a share in the kingdom.

Humayun succeeded Babar and was himself succeeded by Akbar. Both were the eldest sons of their fathers. Jahangir too, who succeeded Akbar, was the eldest son. But this does not establish the principle that the eldest alone had a right to succeed to the throne. Apparently it seems to be so, but the facts lead us to other conclusions.

Among the ancestors of Jahangir, right up to Timur, we find a tendency towards the establishment of the principle of primogeniture. But immediately we shall see that an effort to have this principle recognized could not succeed. Circumstances and the successors of Timur both conspired to bring about its failure.

In Timur's conception of kingship the partner had no place. This is the reason why he did not divide his kingdom among all his sons, who were four in number. Probably he believed in the right of primogeniture; for, in bequeathing his kingdom to his successors he exhibited a tendency towards it. Ghyasuddin Jahangir Mirza was the eldest son of Timur. He died within the lifetime of his father and left two sons, Mohammad Sultan and Pir Mohammad. Timur declared Mohammad Sultan his heir-apparent and overlooked the rest of his sons. Unfortunately the grandson also could not live very long, but died before his grandfather. Umar Sheikh, the second

son of Timur, had already died. The third and fourth were still alive but at the time of his death Timur called all the nobles, etc., and made a will in favour of his other grandson Pir Mohammad who was the son of his eldest son Jahangir. This clearly exhibits Timur's bias towards the principle of primogeniture. But Timur's will remained only a pious wish. Immediately after his death the succession was contested between Pir Mohammad and another grandson, Khalil. Shah Rukh, the fourth son of Timur, was confirmed in the sovereignty over Iran and Turan. There is no use entering into all the details of the struggle that ensued between the two grandsons, nor is it necessary to show the manner in which Khalil was turned out by the nobles, who were themselves removed from the throne by the intervention of Shah Rukh. It was clear that no respect was paid to the principle of primogeniture.

We find this indifference rather disregarded in other successions as well : Shah Rukh Mirza died in the year 1448. " Ulugh Beg, as the eldest son of Shah Rukh, considered himself heir to the entire empire, and on hearing of his father's death set out to go to Khurasan." But what do we find ? Abeddowlah, the son of Baisanghar Mirza, i.e., the nephew of Ulugh Beg, had forestalled him already. From Ulugh Beg's resolve it is undoubtedly clear that there was some such thing as the claim of the eldest son to the entire empire. But it had no recognition in fact. On the contrary, the usurpation of the throne by a nephew makes us sceptical. We begin to doubt the very existence of such a principle. The total denial of the principle may be reckoned as a fallacy of malinference. But there can be no gainsaying the fact that the principle of primogeniture had no force behind it. It was not recognized as a right.

Sultan Abu Said Mirza, although the eldest son of Sultan Mohammad Mirza, did not succeed merely because

of being the eldest son. Like Pir Mohammad, Khalil, Abdul Latif, Abdul Aziz and Abdullah, he had to fight his own battle. He participated in the war of succession that was furiously raging between an uncle and his nephew (Ulugh Beg and Abeddowlah), between a father and his son (Ulugh Beg and Abdul Latif) and so on, and at long last succeeded in ascending the throne by defeating, and killing Abdullah who was another grandson of Shah Rukh who had ascended the throne of Samarkand¹; but with Abdullah's death Abu Said's troubles did not end. He had to fight for every inch of the ground and was engaged in war for fully thirty years before he could breathe an air of relief.² From this struggle it is evident that every son and grandson or nephew of the deceased ruler thought himself entitled to the throne. The principle of primogeniture was not fully recognized.

Let us consider the case of Abu Said's descendants. Unfortunately we notice the same fratricidal wars and disunion. Ahmad, his eldest son, no doubt rules for twenty-seven years, but there is always a quarrel between Umar Sheikh and Ahmad. His brother Mohammad succeeds him in 1494 and slaughters all his youthful nephews and himself dies in 1494.³

It is said that Mahmud, not Mohammad, succeeded Ahmad. The point need not detain us. It is a fact that Ahmad was succeeded by one of his brothers.

Mohammad had four sons. All began to quarrel. In the beginning, with the help of the Uzbegs, Baisanghar Mirza, the second son, came to the throne. The youngest Sultan Ali was invited because of the weakness of Baisanghar Mirza. Baisanghar was eventually restored. But the

¹ Vombrey, History of Bokhara, p. 224.

² Skrine & Ross, The Heart of Asia, p. 177.

³ *Ibid.*, p. 178.

struggle did not terminate. Samarkand very soon became the target of every brother's attack and Babar too, though a cousin, claimed Samarkand. Babar advanced from Andijan, Masud Mirza from Hisar and Sultan Ali from Bokhara.⁴ The struggle ended in the division of Samarkand between Sultan Ali and Babar; and ultimately Shaibani Khan wrested Samarkand from their hands.

In the struggle two things are significant. The people of Samarkand invite the youngest, and by their invitation express a living interest in the choice of their rulers. . . . The claim of the eldest, Masud Mirza does not seem to be so near, for we do not find any attempt on the part of the people to consider it. When they became disgusted with the weakness of Baisanghar, who was younger, they ought to have looked to the eldest son as their probable ruler. But this we do not find. Sultan Ali is invited. Nor do we find any protest on the part of the people when Baisanghar—though younger—comes to the throne in the lifetime of the eldest. In the midst of the struggle we do hear a feeble voice raised in the name of primogeniture when every one was attacking Samarkand; Masud Ali the eldest also attacked it, or put forward his claim as the eldest son of the late king and also the elder brother of the two competitors (Baisanghar Mirza and Sultan Ali). It was a cry in the wilderness.⁵

The successors of Omar Sheikh Mirza have no different story to tell. Zahiruddin Mohammad Babar, who succeeded Omar Sheikh, was no doubt the eldest, yet his claim to kingship was not allowed to go unchallenged. He alone was not entitled to the entire kingdom. Jahangir, the younger brother of Babar, had also some claim. The supporters of Jahangir demanded that as Babar had got Samarkand he should allow Jahangir to be the ruler of

⁴ Erskine, History of India, p. 100.

⁵ *Ibid.*, p. 100.

Andijan and Akshi. Apart from the claim of partnership, we read in the memoirs of an effort on the part of the supporters of Jahangir to dismiss Babar and make Jahangir Mirza king in his place⁶. . . . It would be said that Jahangir was a mere pawn in the hands of Ahmad Tambol and Uzan Hussan who had become dissatisfied with Babar. Whatever may have been the reason of Jahangir Mirza's attitude towards Babar, this much is abundantly clear that the principle of primogeniture had no sacredness or reality about it. It could be easily deviated from and opposed without bringing any public obloquy.

Humayun's troubles were in a large measure due to these unfixed and uncertain laws of succession. It has been pointed out in the beginning that Babar's mother was the daughter of a Mongol Khan. The laws of succession obtaining amongst the Mongols were quite different from those of the Turks. Amongst the Mongols usually the son of the deceased Khan did not succeed. The brother of the dead ruler had a greater claim. "Among the Mongols a man was not succeeded by his son so long as he had brothers living. When the brothers were exhausted, the inheritance reverted to the family of the eldest brother. Thus on the death of Ogtai, whose last surviving brother Jagtai died in 1240-41, the rightful heirs to the throne were the sons of Juchi.⁷ If one were to study the genealogical table given in the English translation of Tarikh-i-Rashidi on page 49, one would be convinced of the veracity of the statement made by Howorth in his History of the Mongols. From this principle it clearly follows that "the claim of the son to rule by virtue of his being the eldest one found no place in the Mongols' laws of succession. Changiz Khan without the least difficulty displaced his eldest son and so did Ogtai." Juchi's family

⁶ Erskine, p. 91, and Memoirs of Babar, p. 27.

⁷ Howorth, History of the Mongols, Vol. II, p. 64.

succeeded therefore not to the Imperial dignity but only to their father's special appanage which was apparently coterminous with Khwarizm proper and the steppes of Kaikates, the Ural, the Jaxartes and the Oxus being the rivers which watered it.⁸ Messrs. Skrine and Ross in their book *The Heart of Asia*, at the beginning of the chapter devoted to the successors of Timur, very significantly remark that Changiz Khan exhibited a great skill in statesmanship when he divided his unwieldy dominion among his sons and thus removed a great cause of jealousy such as would inevitably have arisen, had one child been exalted above the rest. They further remark that Timur's disregard of this sound principle of statecraft in the disposal of his conquests, brought upon his dynasty the curse of perennial rivalries or mutual hatreds, which led to the disruption of his empire, and paved the way for the advent of the alien ruler.⁹ One may or may not agree with the above authors with regard to the causes which they have assigned for the stability of the one or the disruption of the other; yet we must agree at least on this point that Changiz Khan recognized the claim of every son in the kingdom. So, from the side of Babar's mother, we notice at least two contributions which the Mongols have made: firstly, that the brother of the deceased ruler has a greater claim to the throne than the eldest son, and secondly, that all the brothers have some share in the kingdom of their father. With this definite heritage from his mother's side plus nothing very definite from his father's side, Babar enters India. By his death-bed we find a play and inter-play of all the principles of succession, which Babar had inherited. Timur believed in the indivisibility of empire, and accordingly bequeathed his kingdom to only one son. Changiz had a different view and he did otherwise.

⁸ Howorth, p. 36.

⁹ Skrine & Ross, *The Heart of Asia*, Chap. XXV, p. 173.

Babar probably was not clear. We find him oscillating between the two sets of ideas. In spite of his belief in the indivisibility of the empire, we find him pleading Kamran's cause for a slice—nay a big slice—in the kingdom which he was about to bequeath. In the year 1628, two years before his death, we see him exhorting Humayun : " If Kamran thinks Balkh too small a government, let me know, and I will by the divine grace remove his objection by adding something from the neighbouring territories. You know that you always receive six parts and Kamran five; you must always attend to this rule and unfailingly observe it. Remember too always to act handsomely by him. The great should exercise self-command and I do hope that you will always maintain a good understanding with him. Your brother on his side is a correct and worthy young man and he must be careful to maintain the proper respect and fidelity due to you."¹⁰ A little further we find him again exhorting Humayun : " If you are desirous of gaining my approbation, you must not waste your time in private parties, but rather indulge in liberal conversation and frank intercourse with all about you. Twice every day you must call your brothers¹¹ and Begs to your presence, not leaving their attendance to their own discretion, and after consulting with them about any business that occurs, you must finally act as may be decided to be most advisable."¹² The above two passages present before one the conflict of Babar's mind—an effort to reconcile the irreconcilables. He wanted to make Humayun supreme and obeyed, and at the same time desired to give something to Kamran by way of right. Many reasons can be surmised —maybe, correctly—for such an attitude of Babar, but it is evident that this attitude of Babar is partly responsible

¹⁰ Leydon & Erskine, *Memoirs of Babar* (Translation), p. 391.

¹¹ *Ibid.*, p. 392.

¹² *Ibid.*, p. 392.

for many of the misfortunes of Humayun. Humayun's entire reign is a sad commentary on the principle of the divisibility of the empire. It is quite possible—even probable—that Babar did so with a view to let Humayun profit fully by his bitter experience. Jahangir had troubled him and all his predecessors had quarrelled amongst themselves, simply because usually the kingdom was not divided among the sons of ruling Timurides, and all the more so as no definite principle of succession was laid down.¹³ We have just seen it ourselves. Babar knew the nature of all his sons, specially of Humayun and Kamran. He apprehended—and rightly—a bid for power between the two. For some reason or other, he wanted Humayun to succeed him. But he was also aware of the trouble that Humayun would have to encounter from the side of his brothers, especially Kamran. His father's quarrel, with all his brothers who had divided Abu Said's kingdom among themselves, was still fresh in his memory. Jahangir's claim to the entire kingdom always troubled his mind. He disapproved of the principle which recognized the division of the empire among the surviving sons of a deceased ruler. With all his desire and solicitude to keep the empire intact, Babar fully realized the elements of the disruptive forces which partly constitute human nature. If one son succeeds to the throne of his father, he does not set at rest the passions of ambition, jealousy and greed. On the contrary, the succession kindles them. One son is as good as another. The mere accident of the time of birth should not deprive one of his legitimate rights in the patrimony. Every son has a share in his father's kingdom. Thus the

¹³ After the death of Abu Said his kingdom was divided among his sons. Four became independent: (i) Sultan Ahmad Mirza (elder paternal uncle), Samarkand and Bokhara; (ii) Sultan Mohammad Mirza (younger), Hisai, Badakhshan and Kandez; (iii) Sultan Ulugh Mirza, Kabul and Ghazni; (iv) Omar Sheikh Mirza, Farghan.

other son argues when one alone becomes the successor. Babar wanted to check these disruptive forces. He did not want to partition his empire, nor did he want that his sons should quarrel among themselves, and, like the four sons of Abu Said, his grandfather, divide the empire immediately after his death. He also wanted to free Humayun from such fratricidal wars as he had himself had to fight with Jahangir.

On his death-bed he made an effort to reconsider these two principles of the indivisibility of, and partnership in, the empire. He entrusted all that he had to Humayun's keeping. He said to him, "Moreover, Humayun, I commit to God's keeping, you and your brothers and all my kinsfolk and your people and my people and all of these I confide to you; the cream of my testamentary direction is this: Do naught against your brothers, even though they may deserve it."¹⁴ After confiding everything to Humayun he added a saving clause in which lay the security of all his sons. Although in the matter of political succession the dying wish of the ruler often remains merely a pious wish, yet to our great surprise we find Humayun carrying out his father's wish religiously even to its very letter.

In making a request of Humayun to desist from doing anything against his brothers, Babar was probably moved by two feelings. One must have been political as has been just pointed out. He did not like to divide the empire and at the same time wanted to give something to his other sons. That something was to be decided by Humayun, and was to be retained by them during Humayun's pleasure. Babar's affection for his other sons seems also to be responsible for such a one-sided will. It was a peculiar commandment: "Do naught against your brothers even though they may deserve it."

¹⁴ Humayunnamah, tr. A. S. Beveridge, pp. 108-9; A. N., trs. H. Beveridge, i. 277.

Humayun was bound to forgive and forgive helplessly, and his brothers were let loose to do whatever they liked. Sagacity and statesmanship gave all to Humayun, but paternal love and affection took back from him all that was divine in him, e.g. forgiveness for his sons.

It is thus that Babar wanted to check the tendency to disruption; Humayun to be ever forgiving and the other sons to be solely dependent on his goodwill. This moral contrivance to check a political crime tottered down immediately. To a certain extent it became the root cause of Humayun's troubles. So Humayun ascended the throne with many disadvantages. He was placed in a difficult situation. There was nothing very positive for him on which he could base his kingship. Before Babar's accession we have seen that the laws of succession were in the melting pot. Nothing was definite. The two streams of thought had not yet become one. An effort to reconcile the two had made confusion worse confounded. Humayun who could have fought his own claim to the throne was to a certain extent checked from doing so. There is no gainsaying the fact that Humayun's misfortune had some of its roots in his own character. But a great deal was due to the conspiracy of the times. The Moghul rule in India had hardly begun. His kingship was beset with all sorts of difficulties, with uncertain laws of succession, and with hostile brothers around and beside him; amidst unknown and hostile people in a foreign land Humayun had stepped to the Royal throne. The atmosphere was surcharged with indecisiveness. Before it even the heart of the bravest would have quailed. To aggravate his troubles the Pathan kings of Delhi had left a very bad tradition so far as the problem of succession was concerned. It is needless to trace it from the time of Iltutmish onward. It is enough for our purpose to mark the trend of events from the time of the Tughluks. Firoz

Tughluk was elected to kingship in spite of the claims put forward by Mohammad Tughluk's sister's son and his own. The former was declared incompetent and the latter rejected on account of his being a minor. The Sayyids have nothing very positive to contribute. The Lodis again turn over a new leaf. Islam Khan dies after appointing his nephew Bahlol as his heir-apparent. His son Kutub Khan was alive but he was superseded. He was elected after great bitterness and heart-burning. Bahlol went a step further. Azam Humayun, son of his eldest son, was alive; yet he appointed as his heir Sikandar who was supposed to have been born of a goldsmith woman. So even among the Muslim rulers of India we do not find any favourable bias for the principle of primogeniture. This is why Humayun felt so insecure in his kingship. We find him conciliating all his brothers by giving¹⁵ them fiefs big and small and even giving in with good grace when Kamran takes possession of Lamghan and Peshawar, and later on of Lahore. Hindal also took advantage of the constitutional weakness of Humayun's kingship and declared himself sovereign at Agra. At the critical hour when Humayun was busy in Bengal, he had the Khutba also read in his own name. But this did not prove of any avail. He failed to get the necessary support. After some time Humayun arrived.

After Humayun's defeat and during his flight Kamran also made an effort to have the Khutba read in his own name at Kandhar. After four months' insistence he prevailed over Khanzada Begum and others, and got the matter settled in the following manner, "Very well, the Emperor is now far away. Read the Khutba in my name and when he comes back, read it in his."*

¹⁵ Kamran gets Kabul and Kandhar, Askari gets the jagir of Sambaj, Hindal gets Alwa, Suleman Badakhshan.

* Persian *Humayunnamah*, p. 62, tr. A. S. Beveridge, p. 161.

These two attempts on the part of Humayun's brothers to take advantage of his troubles and difficulties show amply the way the wind was blowing. Regard was surely paid to the nomination of the dead Emperor, yet no opportunity, however insignificant, was missed by other sons to have themselves declared the sovereign. Incidentally a question arises: whether the nomination of Humayun to succeed Babar was made because of his being the eldest son, or because he thought him to be the fittest and that his being born the eldest was only an accident. An answer to the question will be found if we examine critically the dying declaration of Babar and his attitude on the problem of the succession when Humayun was dangerously ill. Some light on this will be thrown if we take into account the reason which impelled his brothers to give him their allegiance. To which extent the principle of primogeniture was recognized, will be evident by understanding also the significance of the conspiracy against Humayun.

Gulbadan describes the death scene in the following manner : " Next day he called his chiefs together and spoke this wise. For years it has been in my heart to make my throne over to Humayun Mirza and to retire to the gold-scattering garden, by the divine grace. I have obtained all things but the fulfilment of this wish in health of body. Now when illness has laid me low, I charge you all to acknowledge Humayun in my stead. Fail not in loyalty to him. Be of one heart and mind with him. I hope that Humayun also will bear himself well towards men. Moreover, Humayun, I commit to God's keeping you and your brothers and all my kinsfolk, and your people and my people and all of these I confide to you."¹⁶ In this appeal to his chiefs for loyalty to Humayun, Babar makes no reference of Humayun as the

¹⁶ Persian Humayunnamah, p. 108.

eldest. He does not give any reason for his choice excepting this that it had been in his heart for many years to hand over his throne to Humayun Mirza. He does not mention the grounds of his selection. In the absence of any definite grounds of selection it may be said that probably Babar considered Humayun to be the fittest of all. We have some grounds for hazarding this conjecture. In the year 1430 Humayun fell dangerously ill. Babar was extremely anxious. Maham, Humayun's mother, consoled Babar that he need not worry as he had other sons in case Humayun passed away. She would be really sorry, for Humayun was her only son. Babar replied to this significantly, and from this we can infer some reasons of Babar's choice. He said to her, "Maham, although I have other sons, I love none as I love your Humayun. I crave that this cherished child may have his heart's desire and live long and I desire the kingdom for him who has not his equal in distinction and not for the others."¹⁷ The basis of his choice for his successor seems to be this : Babar's immense love for Humayun and secondly that Humayun excelled all in accomplishments. It may be said that Babar with a view to console Maham exhibited so much regard for Humayun and extolled him above his brothers. It would be believable had not an incident happened to dispel this doubt. Babar's sacrifice for his son is sufficient to convince the most sceptical. The sincerity of Babar's statement to Maham has been proved beyond doubt. Babar's death has confirmed it. That he held Humayun in great esteem is evident from the last sentence which he addressed to Humayun's mother. He regards Humayun as his successor as Humayun is peerless and has no equals in distinction. Babar does not consider Humayun's deserts to succeed to be his primogeniture, but his virtues, and the attachment that Babar had for him.

¹⁷ *Ibid.*, p. 20; A.N. Beveridge's Translation, pp. 104-5.

The conspiracy of Khalifa to oust not only Humayun but all the sons from succession reveals another story. Mehdi Khwaja, the probable candidate, was the husband of Babar's full sister Khanzada Begum.¹⁸ The man proposed or contemplated was not even in the direct line of Babar's family. The mere fact that such a succession could be thought possible drives one to believe that the principle of primogeniture or that the sons of the deceased ruler had a claim to the throne, was considered of little importance in matters of succession. Humayun's sudden departure from Badakhshan, the consultation of the three brothers on the seriousness of the situation, their determination to checkmate the plans of Khalifa—all these point to the conclusion that all the sons of Babar had begun to doubt the chances of succession. There was no talk of primogeniture.¹⁹ This much about Humayun's succession. Akbar's succession is almost free from trouble. He ascends the throne almost unchallenged. There was some danger from the side of Kamran's son. At the time of Humayun's death he was at Delhi. It is to the credit of Tardi Beg that by his tact and loyalty he succeeded in arranging the bloodless succession of Akbar.

But everything was not so very encouraging as it promised to be. In the year 1566, a bid for the throne of Hindustan was made by Akbar's younger brother Mohammad Hakim Mirza. The Uzbeg rebellion in 1565 encouraged him to do so. He invaded the Punjab and advanced

¹⁸ Rushbrook Williams, *The Empire Builders of the 16th Century*, p. 170.

¹⁹ *Ibid.*: "The three brothers had a consultation and were apparently agreed upon the seriousness of the aspect of affairs. They must have seen that the future position of all the three depended upon the ability of Humayun and his mother to checkmate the schemes of Khalifa. Finally they hit upon a plan of action. It was determined that Humayun should proceed post haste to Agra while Hindal was to take the place in Badakhshan. Kamran meanwhile was to keep tight hold of Kabul. This plan was duly carried out."

up to Lahore, but found it impossible to capture it. Early in 1567, Akbar arrived there and shattered the hopes of Hakim with the result that the brother retired to Kabul.

Hakim's bid for the throne establishes once more the uncertainty of the law of succession. It has been pointed out above that no opportunity was missed by any son of the deceased ruler to put forward his claims. Hakim is also one of the opportunists. It was not his fault. The laws of succession were such as whetted the ambition of every aspirant and always kept the ruling monarchs in a state of insecurity. The analysis of the previous reigns had proved it.

Akbar's reign drives us to the same conclusion. A decade after the commencement of his reign we hear of a bid for the throne of Hindustan from the side of his younger brother. The effort failed. Again after a lapse of about 25 years (in the year 1582) we notice a rising of Hakim. The opportunity was afforded by the unfavourable atmosphere that Akbar had created around himself by his religious policy, his unorthodox views and military reforms, etc. Six years (from 1579 to 1585) were very critical in the whole of Akbar's reign. There was a formidable conspiracy to depose him. We find rebellions here and rebellions there. Gujerat and Bengal were the storm centres. The rebels wanted to raise Hakim to the throne of Hindustan. Hakim was an ambitious man. He fell in with this scheme. There was nothing in the law of succession which could put a brake upon his evil designs and fruitless ambition. Hakim advanced towards India, but he was repulsed ; and by the August of 1581, Akbar crossed the Indus and reached Kabul, where he stayed for a week. He made over Kabul to his half-sister, which tacitly allowed the assumption of the government by Hakim. So long as Hakim was alive, Akbar kept a watchful eye on him. His mind found peace only after the death of Hakim.

It may be argued that Hakim's rising should not be taken to spell the uncertainty of the laws of succession. Issues graver than the mere fact of succession were involved in the claim of Hakim to the Moghul throne. Akbar's religious policy, his principles of administration, his general outlook—all were antagonistic to Muslim rule. That is why Hakim waived the banner of Islam and claimed the throne against an apostate brother. These arguments may hold water if advanced on behalf of the rebels. But they fall flat if they are made to constitute the backbone of Hakim's rising. It is as clear as daylight that Hakim's participation in the rising was due purely to personal and selfish grounds. He wanted the throne. He had expressed this as early as 1566. Till the year 1580 he was silently waiting for an opportunity. The opportunity at last, as we have just pointed out, did come and he exhibited no slackness or scruples in availing himself of it. Jahangir's accession opens up a new chapter altogether. Till now throughout our discussion we have generally been concerned with the quarrel of a brother with another brother, of a nephew with his uncle, of a grandson with another cousin-grandson and so on. Jahangir's accession involves the quarrel of a son with his father. In the year 1599, Salim revolts against his father, becomes very impatient within the very lifetime of Akbar, entrenches himself within the strong fort of Allahabad built by Akbar, extends his rule over part of Behar and assumes the insignia of independence. Khibu was created Kutubuddin Khan and appointed to govern Behar. Lal Beg was sent to administer Jaunpur while Kalpi fell to the share of Bahadur. The thirty lacs of rupees in the treasury of Behar were appropriated to the Prince's service. Jagirs and titles were granted to his principal supporters. Among others Abdullah received the designation of Khan.

By the middle of 1601 reconciliation was brought

about. He was ordered to take charge of the governorship of Bengal and Orissa. At Allahabad, he again raised the banner of revolt, assumed the title of king though still designating his father as the great king. He set up a regular court and requested the Provincial of Goa, though in vain, to accredit missionaries to him. He entertained some sort of military aid from the Portuguese at Goa. He issued farmans and granted titles and jagirs.²⁰ Salim got Abul Fazal murdered lest he might prove a hindrance to his accession. The crime was too heinous to be excused by Akbar. In spite of all this in April a reconciliation was again brought about through the intervention of Sultan Salima and Maryam Makani. Salim was forgiven and declared heir-apparent. Immediately he was asked to take charge of the Mewar campaign which he had left unfinished in the year 1599. Salim did not want to leave the capital. It would have been suicidal for him. Akbar was too old. He might die at any time. His absence might go against him. When everything was uncertain much depended upon the course which events took at the time of the ruler's death. Consequently he stopped at Fatehpur-Sikri and made all sorts of excuses to avoid the campaign. He asked permission to return to the jagir of Allahabad. The desired permission was granted. It was impolitic. We find him again setting up an independent court. Favourites began to be obliged by lavish gifts and grants. Akbar marches against him in August 1604. Maryam Makani falls seriously ill. She dies. Salim, being afraid of Akbar's wrath, avails himself of this misfortune and having tendered his apology, arrives at Agra on November 9, 1604. Akbar received back the prodigal son. He was confined for ten days. Salim's mother and sisters interceded on his behalf and he was released. Akbar's health was fail-

²⁰ *Ibid.*, p. 50.

ing. He was nearing his end. Just at the close of his career, a strange thing happened. We find a conspiracy against Jahangir's accession. A party was organized which wanted to champion the cause of Khusru, the eldest son of Jahangir.

The five years of Salim's revolt disgusted Akbar completely. His two other sons had already passed away. Murad died in May 1595, and Daniyal drank himself to death in April 1604. Akbar was extremely anxious for his successor. The surviving son who had greater chances of succeeding had completely shattered his hopes. It would not be surprising if in the hour of despair and desperation Akbar once thought of disinheriting his son Salim. His recent unbecoming behaviour deserved that. It is no wonder then that a worthy son (Khusru) is pitted against an unworthy father (Salim). Aziz Kokah and Man Singh convened a conference of notables and chiefs of Islam to decide about the supersession of Salim and the accession of Khusru. The conference failed to achieve anything because of the opposition of Saiyad Khan Barha, who thought the supersession against the best traditions of the Chaghtais. Man Singh and Aziz Kokah also failed to get the assent of Akbar to their proposal. Salim appears before his father penitent and full of remorse. Akbar signed to his attendants to invest the Prince with the turban and the robes and to gird him with his own dagger. Akbar forgave his son and having invested him with royalty departed for ever.

A week after Akbar's death Jahangir ascended the throne on October 24, 1605. It was not a throne of roses. Nemesis came too soon. Jahangir had to reap the fruit of his own actions. Like his father he had also to face the rebellion of his own son. The difference was that of time. Jahangir had to experience it many times at the beginning as well as at the end of his reign, whereas Akbar

had its bitter taste only at the close of his glorious career. The story of Khusru's revolt is too well known. How it was suppressed and how his companions were punished, need not detain us. He was imprisoned, blinded and then diplomatically handed over to Shah Jahan (Khurram) who had him removed somehow from this habitable world. Towards the close of Jahangir's reign (1623—26) Shah Jahan himself was a rebel against Jahangir. Shah Jahan surrendered many of his forts and gave two of his sons Dara and Aurangzeb as hostages after his capitulation.

In the year 1625 we hear of Parvez's bid for the throne. The story of Mahabat Khan's *coup de main* on Jahangir is too well known. Parvez failed to carry out his designs.

Immediately after the death of Jahangir in the year 1627 (October 28) there arose a struggle for the succession. Khusru had died ; Parvez had also followed him to the grave a year before the Emperor's death. There were two competitors for the throne : Shahriyar and Shah Jahan. The former was backed by Nur Jahan, his mother-in-law ; the latter had the full support of his father-in-law Asaf Khan.

Shahriyar advances from Lahore by proclaiming himself Emperor, and swelling his followers by the free distribution of money. Shah Jahan was in the Deccan. But Asaf Khan proved more than a match for Shahriyar. Dawar Bakhsh, son of Khusru, was proclaimed Emperor in the absence of Shah Jahan. This was a stop-gap arrangement. Shahriyar was opposed and defeated, imprisoned, and blinded. Within a month of Shah Jahan's succession, Shahriyar, Dawar Bakhsh and others were secretly put to death. With the steps soaked in the blood of his kinsmen, Shah Jahan ascends the Royal throne.

It has already been said that Jahangir's reign opens a new chapter in the problem of succession. Since his revolt as a Prince till the close of his career as an Emperor

we come across many divergent principles of succession. There is confusion. It is difficult to draw a picture and arrive at some definite conclusion.

Of the impatience of Salim to succeed we read many things. After making due allowance for the impetuosity of youth and ambition to rule, so natural and legitimate in a young prince, we are irresistibly led to the conclusion that Salim's rebellion was more due to desperation and diffidence than anything else. The laws of succession were so uncertain that Salim had become hopeless. Apparently there seemed to be no reason for his hopelessness. He alone had the chance of succession. He was not only the eldest but there was no one else among the sons of Akbar in the field to compete with him. As mentioned above, Murad had died in 1595, and Daniyal in the year 1604. Jahangir's succession seemed to be doubly sure. But things are seldom what they seem. He understood the significance of this proposition very well. He was not oblivious of all that was passing behind the scenes. He knew his chances very well and made a correct and true estimate of his position, so far as the question of succession was concerned. Nor would he build much hope on the fact that both of his brothers, the probable rivals, were dead. If both of these had been the deciding factors in his succession, he would have silently waited for the happy day of his succession and easily curbed his impatience. The situation was that they were not. In this undecided and uncertain situation lies the keynote of Jahangir's rebellion.

Let it not be understood that the claim of first-born was not at all recognized. The emphasis laid here is on the fact that this alone was not the deciding factor. There was something more besides to decide the issue. The king's dying declaration—rather nomination—was the chief thing. At least in Jahangir's case everything de-

pended on Akbar's approval and nomination. The whole struggle of Jahangir for the throne almost revolves round this main thing. How to gain the confidence of Akbar? It was the difficult and insoluble problem before Jahangir. By the fast life that he had led he had almost alienated the sympathies of his tutor and the king. His ferocious cruelty had estranged the king and the people alike. Jahangir was fully aware of his position and found himself his worst enemy. He was too weak to fight himself. The chief obstacle to his succession was his dissolute life. He would not or could not improve it. He decided to revolt. The history of the revolt has been given above in a summary form. Abul Fazal, whom he dreaded and considered the chief obstacle in his way, he got murdered through the help of the Bundela Chief Bir Singh Deo. But this failed to solve the problem. It unfortunately made the problem more acute and inextricable. Khusru was set up as a rival against Jahangir (Khusru's own father). The manner in which this conspiracy was hatched and frustrated has been already mentioned. The assembly convened to decide in favour of Khusru broke up for the reason given above. Akbar too did not give his assent, but on the contrary forgave Jahangir and declared him as his successor.

It may be averred that Akbar decided for Jahangir simply because he was the eldest, and Saiyad Khan of Barha also favoured him and sided with him because he was the eldest. A closer examination of the facts will reveal that it was not the sole reason of their inclination towards Jahangir. The problem at the death-bed of Akbar was of a different nature. That the eldest alone had the right to succeed was not the question at that time. The problem was whether the son could be superseded by the grandson, the father by his son. The Pathan kings had solved this in their own way. They had no hard and fast rule about it. The succession of a grandson or his nomina-

tion as the successor by the dying Emperor did not shock the people or the Royal family. There are many instances to justify this. But the ways of the Moghuls were quite different. We do not hear of any such contemplated supersession as that of Jahangir by Khusru ; in other words, of the father by his son. There has been only one instance immediately after the death of Shah Rukh Mirza which can be cited as an example in favour of the proposed supersession. Ulugh Beg was not only superseded by his son Abdul Latif but murdered also. Seemingly this ghastly act of murder may sound as a precedent—though very deadly and bad, yet it cannot be mentioned to justify the supersession of Jahangir which was under contemplation. Abdul Latif's revolt and his murder of his father may extenuate the revolts of Jahangir against Akbar, that of Khusru and Shah Jahan against Jahangir and so on, yet it can by no means lead us to the conclusion that the son could be chosen in preference to his father during his lifetime. The son may revolt against his father and even murder him—that was his look-out and responsibility. The people as such and the dying king had nothing to do with it ; so far as we are aware, in the Moghul dynasty till the death of Akbar, no king or emperor ever intended to supersede his son by his grandson, nor did the notables themselves ever propose such a change. Hence the proposal of Man Singh came as a rude shock to the lovers of tradition. Saiyad Khan of Barha naturally cried out : " Of what do you speak, that in the existence of a Prince like Salim Shah, we should place his son upon the throne ? This is contrary to the laws and customs of Chaghtais, Tartars and shall never be." Saiyad's cry was not in the wilderness.²¹ The proposed supersession instantly fell through. The conspiracy failed.

²¹ History of India, Vol. VI, pp. 169-70; Asad Beg's Wikaya (Elliot and Dowson).

Akbar too could not be won over. He also probably did not like to break the tradition. Had any of his other sons been alive, it is very likely that in the hour of disgust at Jahangir's repeated disobedience and revolt, Akbar would have superseded him, although he was the eldest. The fact that he was the eldest, would not have weighed with him.

The father in Murad would have been satisfied. But in choosing Khusru in place of Jahangir, Akbar hesitated. This was too much for an affectionate father. His pride had already been injured by the revolt of the Prince, he did not like to add insult to it by telling the world that a mighty and great Emperor like Akbar could not have even an unworthy son to succeed. The paternal love forgave all that was ignoble in Jahangir and when the choice lay between the son and the grandson, he chose the former.

No comment is necessary on Khusru's revolt against his father Jahangir. If Jahangir revolted on account of desperation and diffidence, Khusru unfurled his banner of revolt on grounds of fitness and competency. He put forward his claim as a formidable rival. Whether Khusru's claim on grounds of fitness was just or unjust, need not detain us. This revolt at the beginning of the reign, confirms the belief, that the laws of succession were extremely uncertain. There was no definite principle that guided it. Jahangir's nomination by Akbar only indicates, to a certain extent, the tradition which insisted that kingship should go to one of the sons of the deceased ruler. A conspiracy to instal Khusru in Jahangir's place shows the other side—that this tradition also had no great sanctity about it. Khusru's revolt and Jahangir's fear dispel the charm that may have lingered still around it. Shah Jahan's revolt and his subsequent succession prove conclusively that the principle of primogeniture had lost all its importance and

significance during his time. Khusru was born on 6th August, 1587, and Parvez about two years later—on 2nd October, 1589, Khurrum was younger than these two and saw the light on 2nd January, 1592. Shahriyar was the youngest, being born in the year 1605.

Of all these sons Khusru was the oldest. On the principle of primogeniture his claim was the greatest, and in the natural course of events, he ought to have succeeded Jahangir after his death. But that was not to be. There was no such principle of succession as that of primogeniture. It was a word with which the Moghuls of those days were hardly familiar, and even if they were, they attached very little importance to it. Shah Jahan's struggle for succession brings out this fact very clearly.

Khusru's claim to the throne may be dismissed by calling him a rebel against his father. But Jahangir also had rebelled against his father. It was not such an indelible blot as could not be washed by Khusru's penitence or Jahangir's forgiveness. Jahangir had rebelled thrice and had been pardoned thrice. This could happen in the case of Khusru as well. But as ill luck would have it, he was not the sole surviving son of Jahangir. Jahangir was not faced with Akbar's difficulty. He had three other sons to look to, and could easily afford to dispense with Khusru. Consequently the mind once prejudiced against Khusru could not and need not be exorcised. In the year 1620-21 Jahangir could be persuaded to the extent of handing over Khusru to Shah Jahan on his march to the Deccan. Another son became the recipient of Jahangir's favours—namely Khurrum. Parvez next to Khusru was ignored. The reasons that led Jahangir to like Khurrum need not be mentioned. In the year 1616 Khurrum was placed in charge of the Deccan affairs and Parvez was transferred to Allahabad and Khankhana was recalled.

Early in November 1616, he was given the title of Shah Khurram and almost a year after on October 12, 1617, he got the title of Shah Jahan in view of the successful and peaceful settlement of the Deccan affairs. He was declared heir-apparent also and was given a chair beside the Emperor, the highest honour that could be conferred on a Prince. It was an unprecedented favour that was shown to Shah Jahan.

The declaration of Shah Jahan as the heir-apparent took place during the lifetime of Khusru and Parvez. The former was assassinated about the month of August 1621, and the latter died in the year 1626 on the 28th October. The declaration was made in the year 1617. This is a clear case of supersession. An elder's claim to succeed was not recognized by Jahangir.

As has been previously remarked, almost everything depended on the sweet will²² of the Emperor. His claim to succeed was the greatest who succeeded in winning his sympathies and favour alike. The question of the elder's claim hardly arose. Even if it did, it was somehow or other silently hushed and passed over.

When so much depended on the Emperor's nomination, every son tried to ingratiate himself with him. If he failed in this attempt and in any way suspected his prospect, he rebelled and revolted and took his chance. This explains to some extent the rebellions of Jahangir and Shah Jahan both. Shah Jahan had been basking in the Emperor's favour, when a sudden change in the political atmosphere came in. The clouds of Nur Jahan's jealousy and intrigue were perceived on the horizon. All became dark and dismal. Shah Jahan became hopeless. He was asked to proceed to Kandhar and thus indirectly help the chances of Shahriyar by his absence. Shahriyar, the

²² Muntakhabullubab, p. 293.

younger brother of Shah Jahan, had married Nur Jahan's daughter, and had thus become nearer to her. She wanted the throne for her son-in-law, notwithstanding the fact that he was younger than Shah Jahan. If Khusrus and Parvez could be ignored for Shah Jahan, there is no wonder, if Jahangir, being persuaded by Nur Jahan, passes over the claims of Shah Jahan in his angry mood. Shah Jahan at first refuses to go to Kandhar and promises to do so on certain conditions, which totally upset Nur Jahan's plan. Jahangir was set by his ears. Hisar, Firoza, Dholpur and other jagirs of Shah Jahan were given to Shahriyar and a threatening letter was despatched to Shah Jahan. All this precipitated the rebellion of Shah Jahan. The man who had been declared heir-apparent in the year 1617, wandered as a rebel, and a disloyal person, five years later in 1622. Such were the uncertain laws of succession. The regard for an elder son may have silently lurked in the mind of the Emperor, but it never formed the basis of his successor's selection. The principle of primogeniture as such was never recognized as right, in the Moghul dynasty in India.

PART II

The Moghul rulers of India believed in the nomination of their successors by themselves. It was the result of a long and varied experience. That is why the nomination of a dying Emperor carried such a force behind it. People respected it. The scions of the Royal family felt bound by it.

When Mohammad died he nominated no one as his successor. The first four Caliphs who succeeded him were not at all nominated. They were elected according to the spirit of Islam and in the most democratic manner. Muawiyah, the founder of the Ummayid dynasty, was the first man to introduce the principles of heredity and nomination. In 676 A.D. he nominated his son Yazid as his successor and had him accepted as such by the people. It was not without reluctance that they gave their consent.²³ The precedent of nomination was followed by the Abbasides also. "The oath of allegiance was paid to the Prince as heir-apparent first in the capital and then throughout the other cities of the empire. But the direct succession of father and son was so little exemplified in actual practice in the case of the first 24 Caliphs of the Abbaside dynasty that for a period of more than two centuries (759—974) only six of them were succeeded by a son.

After the Abbasides it became more common for a son to succeed his father, but throughout the whole period political theory maintained that the office was elective.²⁴ By the sheer force of time and events the office which was originally elective in theory became almost hereditary and nominative in practice. The institution of the Caliphate could present no other or better example in matters of succession. It familiarized the people with the principle of nomination and that too of a son or kinsman. That kingship has a tendency to become hereditary is amply proved by it. It is also evident that the Caliphs were in the habit of designating their heir-apparents.

Among the Mongols the system was a bit curious. It was nomination-cum-election. The Great Khan nominated his successor, but it had to be approved by a general body

²³ Arnold, *Caliphate*, p. 22.

²⁴ *Ibid.*, p. 25.

convened for the purpose. It was called Kuriltai. Although Changiz was the mightiest even at the time of his death, the manner in which he nominated his successor extracts admiration. It seems he showed a great respect to public opinion—at least in the matter of succession. To his death-bed he called his sons and grandsons and exhorted them on the virtues of unity and the dangers of discord and disunion. After these words he asked of those who stood by whether they were not of opinion that he should make choice of the Prince who was capable of governing so many kingdoms after him. Then his sons and grandsons fell on their knees and said, " You are our father, and Emperor, and we are your slaves. It is for us to bow down our heads when you honour us with your commands and to execute them." Then, they rising from the ground, he named Prince Ogtai for his successor and declared him the Caan of Caans by a title of Caan which he gave him and which his successors have kept. They all bowed the knee a second time and cried " What the great Changiz Khan ordains is just—we will all obey him : and if he pleases to command us even to kiss the rod with which we have merited to be chastised we *will do* it without disputing."²⁵

The passage shows the high regard in which one party held the other. Changiz proposed his nomination by the permission of those who stood by him. Those present deemed it an honour to be consulted on such an issue and readily agreed to it thinking the proposal to be just and reasonable. It may be said that this request for permission and ready acquiescence was mere exchange of courtesies at the solemn hour of Changiz Khan's death and nothing more. It could have been believable had not an incident later on happened to dispel this probable doubt. After Changiz Khan's death Ogtai—the nominated successor—

²⁵ Petis de la Croix, *The History of Changiz Khan*, pp. 379-80.

began to receive condolences and sympathies from great lords and Caans. They came in person to console him.

All addressed themselves to Ogtai as the Emperor destined to succeed. But though this Prince had the power to act with full authority, he would do nothing without consulting those whom the Great Khan used to advise with in²⁶ his councils; nay he even protested he could not act as their sovereign till the Diet ordained by the Law had been held and they had examined whether he was capable of reigning. Couriers had been already dispatched to all parts of the empire to summon the Assembly, and it was not doubted that all those who had a right to assist at it would hasten to Caracoram where it was summoned to meet.

It seemed at the time that in this great empire there was an interregnum. Yet the public affairs did not suffer. Jagtai who was the guardian and expounder of the laws had them observed with great exactness. They were held in greater veneration than ever, because the memory of the Legislator was still fresh in their minds. And in truth how could the people choose but have great veneration for a Prince who had rendered them the most formidable and respected people in the world, a prince who had besides all the virtues requisite in great conquerors?

Ogtai pushed his conquests much further into China, and his other successors in succeeding ages seeing about all Asia subjected to their laws carried their victorious arms into Europe,²⁷ even into some of the neighbouring Princes' dominions.

Ogtai's protest is a sufficient testimony to the fact that the approval of the general body alone could give legality to his succession. Mere nomination by a dying

²⁶ *Ibid.*, p. 378.

²⁷ *Ibid.*, pp. 384-5.

emperor did not carry much weight. It was necessary to get the support of the Diet on no other grounds but those of fitness. So among the Mongols on the question of choosing a successor the dying emperor was a proposer and the Diet the chief body which generally recorded its vote in favour of the proposal made by the Caan or the Emperor. A verdict of the general body was necessary to give effect to the Caan's proposal. The Diet alone was the real and legal power which conferred kingship or Khanship on whomsoever it thought fit. There are two other instances to corroborate this. Kuyuk's—Ogtai's son's—accession to the throne was possible only by the help of the Kuriltai. Ogtai had already superseded him by his grandson, Shiramun.²⁸

Kuyuk Khan died in April, 1248. His successor Mangu Khan was also chosen by a Kuriltai. Its decision was final. Although they were rival claimants from the line of Ogtai, yet Mangu Khan was preferred as a Grand Khan.²⁹

We find the mention of a Kuriltai in the time of Timur. After defeating the Mongols, etc., and having cleared them out of Transoxiana completely, Timur entered Samarkand as a virtual conqueror. But he did not assume the sovereignty. It was a diplomatic move. He summoned a Kuriltai in which Kabilshar was proclaimed as sovereign.³⁰ Later on he makes use of the Kuriltai solely to his own advantage. When he found himself quite secure and free from his enemies and rivals, he convoked a Diet (Kuriltai) at Balkh where he got himself proclaimed as the legal sovereign of Transoxiana.³¹

²⁸ Howorth, History of the Mongols, Vol. II, pp. 64-5; Vambrey, History of Bokhara, pp. 146-7; Lane-Poole, The Mohammadan Dynasties, p. 208.

²⁹ Howorth, History of the Mongols, Vol. II, pp. 79-80.

³⁰ Vambrey, History of Bokhara, p. 167.

³¹ *Ibid.*, p. 177.

These instances show the important part which the Kuriltai played at the time of accession to the throne. Even the wish of the last Emperor was not binding on it. Every successor had to prove his *bona fides* by means of its vote alone. Even a mighty Emperor like Timur felt this need at the time of assuming the sovereignty of Transoxiana. Although he underwent this formality simply to avoid the meek resentment of a vanquished people, yet the fact that he had his crown legalized through this help of a Kuriltai raises its importance in our eyes. It might have been shorn of all its power at that time, yet the charm that had gathered around it could not be easily dispelled.

But among the Timurides there was no such thing as the Kuriltai. No doubt the dying emperor nominated his successor, but it required no rectification by another body. It is a different matter whether the people accepted the nominated person as the successor or no. Timur's death scene is worthy of mention here. When compared with that of Changiz Khan, it may help us in formulating our conclusion.

When it became almost certain that Timur's disease was past cure, he called forth all his sons, grandsons, and ladies. In addition to them he sent for his chief nobles. In a fairly short speech he impressed on them the wide expanse of his conquered dominions and the necessity of keeping it intact, although everything in the world was unstable. Before all those who had gathered round the death-bed of Timur, he nominated Pir Mohammad as his heir-apparent and vicegerent. All the chiefs and nobles were further asked by him to be loyal to Pir Mohammad, otherwise discord and disharmony would prevail among the Mohammadans. In the end every one present, young and old, and all the nobles were required to swear by the will of Timur that they would carry it out conscientiously.

and stand by it through thick and thin, and that they would make it binding on others also who were absent at that time. On this all began to weep bitterly and Timur expired after uttering a few words of advice on 'Unity' to his sons.³²

What followed next has been stated already. Pir Mohammad was in Kabul at the time of his grandfather's death. The sensuous life that he had been leading there had made him inactive and slothful. His absence was taken advantage of by Timur's other grandson Khalil who usurped the throne. Timur's will could not be respected even for some time. The sons and grandsons all began to quarrel for the throne. Shah Rukh, the son of Timur, ultimately became master of Transoxiana and left it under the charge of his son Ulugh Beg whom he made the governor of that territory.³³

If compared, the two wills will differ very slightly so far as their contents are concerned. But if we were to take into account the effects of each one of them, we shall marvel at the result. The results are poles asunder. Changiz's will was respected and carried out. Timur's was set aside and almost ignored. Pir Mohammad's delay brought about a revolution and war. Ogtai's refusal to accept the sovereignty so long as he was not elected by the Kuriltai made his position more secure. The interregnum in one case proved dangerous, in the other nothing very extraordinary. Things went on as usual. At the time of Kuyuk Khan's election there was an interregnum. Turkania, his mother, was the regent and carried on the affairs of the state till the election of Kuyuk Khan to

³² Zafarnamah, pp. 656—60; Vambrey, History of Bokhara, p. 192.

³³ Vambrey, History of Bokhara, p. 212; Shrine & Ross, Heart of Asia, pp. 174 & 178.

Grand Khanship.³⁴ Kuyuk Khan died in 1248. Mangu Khan was elected by the Kuriltai. A second Kuriltai was convened on the banks of the Onon to perform the inauguration ceremony. Kuyuk's widow Ogul Gaimish was appointed the regent to conduct affairs of state in the interregnum. The second Kuriltai was held in February 1251.³⁵ The smooth conduct of affairs during the period when the throne was vacant speaks well for the disciplined mind of the Mongols. The regard that they had for the will of the departed ruler was marvellous. They tried to fulfil it if they could, and the spirit of obedience to the decisions of the Kuriltai kept them all together and saved them from many bloody wars such as were the lot of the Timurides.

There is no use commenting on the merits and demerits of the two systems. But one thing is to be specially noted. It is of great use in our further enquiry. The absence of such a body as the Mongol Kuriltai, accounts for at least one thing in the long line of Timurides including the Moghuls of India. Every ambitious prince, elder or younger, tried his best to win the favour of the dying emperor, or to be near his person at the time of his death. No one wanted to be away from the capital. A desire to control the army and gain the sympathy of the chief nobles was another feature. Where people do not possess any ostensible power in the choice of their rulers, the ambitious successor has naturally to seek the shelter of the chief nobles in whom the power after the death of the ruler in such circumstances generally resides. In the absence of any system of rules whoever holds the power becomes, or is thought, worthy of obedience.

³⁴ Howorth, History of the Mongols, Vol. II, pp. 64-5; Lane Poole, History of Mohammedan Dynasties, pp. 208-9.

³⁵ History of the Mongols, p. 80.

After Timur down to the accession of Babar, we hardly find any case of nomination. Every ruler had to die an unexpected death. It may be said that Shah Rukh, in a way, had nominated Ulugh Beg as his successor. But the fate which Ulugh Beg had to meet we have already seen. He not only lost his crown, but in the struggle lost his head also. Abu Said also died in a struggle. After being captured he was handed over to Yadgar Mirza and was beheaded by him. He too formally could not nominate his successor, although it would have been useless. Neither the people nor the scions of the Royal family were in a mood to respect the wish of the dead. After his death, fratricidal wars between Sultan Ahmad, Mohammad, Omar Sheikh, etc., began. After Ahmad and Mohammad the succession was again contested between the sons of the latter. Shaibani Khan ultimately decides the whole question of succession by seizing the throne of Samarkand himself. Umar Sheikh, Babar's father, died an unexpected death due to a precipitous fall. He too could not nominate his successor.

From Babar begins the formal nomination of a successor. He revives this. But before taking into account the doings of Babar and his successors in this connection, it would be in the fitness of things to take a cursory view of the system prevailing in India at that time.

There was no definite system of government prevailing at that time. There was a great conflict between two sets of principles underlying the Pathan rule in India. From Iltutmish (Slave dynasty) down to the Sayyids, we find a set of ideas ruling the government. The Afghans under the Lodis had their own peculiar notions about the government. The one can be represented by the term 'absolute monarchy,' the latter had tribal kingship as its ideal. In the former the king had all the power with himself; in the latter his power was limited by the tribe to which the king

belonged. In absolute monarchy the king had the power even to nominate his successor, whereas in the latter case the successor had to depend on election. Absolute monarchy recognized only one king; tribal kingship was synonymous with as many kings as there were tribes to count.

When Iltutmish died he nominated Razia as his successor in preference to his sons. People recognized her as such, although after Iltutmish's death there was a great opposition only on this point of succession. It is not our concern here to point out whether the succession of a female was justifiable or otherwise. It is evident that there was objection only to the sex of the successor, not to the right of Iltutmish to nominate one, which alone entitled her to succeed. People recognized the power of nomination inherent in the dying king.

Along with this recognition of the king's power we notice a counter-tendency in the people to respect their own likes or dislikes in matters of succession. They did not feel bound to the word that they gave to the dying king. The nobles who had agreed to the succession of Razia in the lifetime of Iltutmish went back on their word and espoused the cause of Ruknuddin who was a debauchee. The reason was very cogent. They were opposed to the accession of a woman. Prejudices die very hard in men. The nobles were victims to the same disease. After some time they did revise their opinion and installed Razia. But there were some unwilling nobles still left to raise the banner of revolt on that issue.

Balban's act of nomination resembles somewhat that of Timur. Mohammad, his dearly loved Prince whom he had nominated as his heir-apparent, died a hero's death fighting the Mughals. After his death he invited Boghara Khan, his second son, whom he wanted to offer the crown after his death. Boghara Khan avoided it. Perhaps he

thought himself too small for the offer, or was quite contented with the government of Bengal. This exhibited a rare virtue of which princes are seldom guilty. On Boghara Khan's recalcitrance Balban's choice fell on Kaikhusrū, his grandson—the son of Mohammad. He spoke about this to his chief officers, and before his death left a will nominating him as his successor.

Balban also thought that it was one of the duties of the king to nominate his successor. Balban was one of the first Mohammadan kings in India who understood the ideal of kingship and knew how to govern. The nomination of a successor was one of his greatest concerns. He performed this duty even on his death-bed and took the chief officers into his confidence at the time of making his choice.

The nobles, although they had agreed to Balban's proposal, again showed the tendency to having their own way in the choice of a successor. The nomination by a dying king was not thought to be as binding as it later on became in the sixteenth century after the advent of the Mughals. We find that the nobles elected Kaiqubad in place of Kaikhusrū. The nominee of Balban was ignored and set aside without the least compunction.

Among the Khiliis we notice a remarkable change. Alauddin appoints Khizr Khan as his heir-apparent, gives him a separate residence and obtains the signatures of the nobles thereto.³⁶ Probably he was aware of the character of the nobles who had gone back on their words in the previous reigns of Balban and Iltutmish. He wanted to bind them by a written document. It was a move in the right direction. The nomination of an heir-apparent is simply to avoid a war of succession. If the dying wish or the nomination of a dying

³⁶ Ziauddin Barani, *Tarikh-i-Firozshahi*, Elliot, Vol. III, pp. 207-8.

king was not respected, there was no meaning in choosing a successor and announcing him as such. Alauddin wanted to take advantage of past experiences. The taking of signatures with a view to insure the succession of Khizr Khan seemed enough. Alauddin confined himself only to this ceremony. Later events will show that his apprehensions, though quite legitimate, were unnecessary. Curiously enough, we find the nobles supporting Shahabuddin for whose succession they had not given any written consent. It is said that when Khizr Khan became a debauchee, Alauddin imprisoned him and deprived him of the succession and superseded him by a child five or six years old whose name was Shahabuddin. The nomination of Shahabuddin in place of Khizr Khan had not been done publicly. That Khizr Khan had been superseded by Shahabuddin was made known to them through Malik Kafur who produced before the nobles a will of the late Sultan, which he had caused to be executed in favour of Malik Shahabuddin, removing Khizr Khan from being heir-apparent. The Sultan's will, strangely enough, was not doubted. On the contrary it was duly respected. They assented to this change. Shahabuddin was enthroned as king with their consent. But as the new sovereign was a child of only five or six years he was a mere puppet in the hands of schemers. Malik Naib himself undertook to conduct the government.³⁷

This ready assent of the nobles to the posthumous will of Alauddin may be due to two reasons. Malik Kafur might have become very powerful after Alauddin's death. They dared not oppose his will or designs. In that case the assent resulted from weakness. Or it may be due to the gradual recognition of the principle of nomination. The nobles had begun to realize that the will of the dead, in the

³⁷ *Ibid.*, p. 209.

very interest of the state, should be respected. Probably both were reasons that actuated these nobles to agree to the accession of Shahabuddin. Malik Kafur's atrocious rule became unbearable. He was killed. The nobles and all others heaved a sigh of relief. Mubarak Khan was placed in charge of all the affairs. Mubarak later on assumed the sovereignty, by replacing Shahabuddin, and took the title of Kutubuddin—Wauddin. The accession of the new king, although his rule became unbearable in the end, was universally accepted.³⁸

Among the Tughlaks the accession of Firoz Tughlak to the throne is full of significance. On the 21st Moharram, 752 A.H. (20th March, 1351, Mohammad Tughlak passed away near Thetta; on the 24th Moharram, 752 A.H. (23rd March, 1351) Firoz Tughlak succeeded him. The manner in which Firoz Tughlak ascends the throne is interesting. For three full days he hesitated and remonstrated against the wearing of the crown. All the nobles, chiefs and generals who had gathered together to elect him as their king stuck to their decision. Firoz had no option but to yield and accept.³⁹

Apparently the case of Firoz Tughlak is that of pure and simple election. But if we examine the circumstances in which he was elected, and the arguments which the nobles and chiefs used in electing him as their king and the spirit of hesitancy in which Firoz accepted the serious responsibility, we shall find that in the importunities of the nobles and the hesitation of Firoz a silent and sincere homage was being paid to the principle of nomination by the deceased ruler. Barani is definite about Firoz's nomination as the heir-apparent of Mohammad Tughlak and uses this fact with a view to persuade Firoz and also

³⁸ *Ibid.*, p. 214.

³⁹ *Ibid.*, p. 275; Persian Text, p. 44.

to establish his claim. Afif is not so definite, but anyhow concludes that Mohammad Tughlak by his acts and behaviour towards Firoz had expressed his intention at least that he wanted him to be his successor. Wolseley Haig differs from both, and from these very writers deduces that at the most Mohammad Tughlak wanted Firoz to be the regent.⁴⁰ This controversy need not detain us. Interpretation of Mohammad Tughlak's wish this way or that does not vitiate our assertion, on the contrary it supports it. At the time of electing Firoz, the nobles were anxious to have the dead man's wish on their side. To them it was a great support. That is why they wanted to make use of it. It may be said that Firoz's hesitation was due to the absence of this very nomination. If it were so, this also supports our assertion that Firoz Tughlak fully realized the important part which the nomination of a dead king had begun to play in the accession of a sovereign.

Before his death he himself nominated his own successor. When Fateh Khan, his nominee, died during his lifetime, Firoz nominated his other son Zafar Khan. But Death even did not spare him. He also passed away. After his death Firoz nominated his grandson Tughlak Shah as his successor. This nominee was the son of Fateh Khan. It is curious that in the Tughlak period a sufficient regard was paid to the principle of nomination by the king, and also to the election made by the nobles, chiefs and others. Once it so happened that after the death of Humayun known as Alauddin Sikandar Shah, the Tughlak throne was vacant for fifteen days.⁴¹ Mahmud, a minor son of Mohammad Shah Tughlak, was elected king by the nobles. This incident clearly shows the way the wind was blowing. There was no strong govern-

⁴⁰ *Ibid.*, pp. 266-7.

⁴¹ Elliot, Vol. IV, p. 208; *Tawarikh-i-Mubarakshahi*, Persian MSS., p. 56.

ment. The power of choosing or electing a king was gradually passing into the hands of the nobles. On two occasions the Tughlaks were without a king. The nobles rose equal to each occasion. By their mutual consultations and concurrence they succeeded in electing their kings—once Firoz Tughlak, the other time Mahmud who ascended the throne with the title of Nasiruddin Mahmud Tughlak.

Among the Sayyids we find that the consent of the nobles was necessary at the time of accession. Khizr Khan three days before his death had nominated his son Mubarak as his heir-apparent. After the death of Khizr Khan, Mubarak ascended the throne with the consent of all the nobles and chiefs. The nobles and chiefs were consulted, notwithstanding the nomination of Khizr Khan.⁴²

From Firoz down to the accession of Mubarak Shah, one invariably meets a peculiar phrase in *Tawarikh-i-Mubarakshahi*.⁴³ Tughlak Shah, Abu Bakr Mohammad Shah, Alauddin Shah, and Mahmud Shah in the Tughlak period and Mubarak Shah in the Sayyid period, all ascended the throne with the consent and concurrence of the nobles, the amirs, the learned, the kazi, etc. The author of the history is very particular in mentioning the phrase, etc. . . .

بالتتفاق - أمراء - ملوك - علماء - قضات وغيره

The period in medieval history was an era of very weak kings. It is no wonder then that the nobles and not the king had the last say in the matter of choosing a successor. The tacit consent of the nobles, etc., not only seems politic but had become almost essential.

The implicit and the tacit became quite explicit in the Lodi period. Afghans are famous for their love of independence; according to them a leader is only a first

⁴² *Tawarikh-i-Mubarakshahi*, Persian MSS. p. 69.

⁴³ *Ibid.*, pp. 51, 53, 56; Elliot, Vol. IV, pp. 24, 28.

among equals and not above them. They believed not so much in one kingship as in tribal leadership. They recognized the power of nomination in a ruler but did not feel bound by his nomination. Like the Mongols they always discussed the successions in their meetings. He alone was a sovereign on whom they conferred the title by common consent.

The king could nominate his successor. But the succession was ensured only by the consent of the nobles, omras and chiefs. Bahlol, although nominated by Islam Khan as his heir-apparent, was elected after great bitterness and heart-burning. Sikandar, the successor of Bahlol, had also to undergo the same ordeal. He had been nominated as heir-apparent by Bahlol, but it was not without great difficulty that he could ascend the throne. Many chiefs were of the opinion that Bahlol's nominee should be set aside and that Azam Humayun should be installed in his place. Isa Khan with others was opposed to Sikandar on the ground of his low extraction. "What business," he explained, "have goldsmith's sons with government since it is proverbial that monkeys make but bad bargain?"⁴⁴ Khankhana Lohani came to Sikandar's rescue.

Sikandar's successor Ibrahim was elected to the throne in a similar fashion. All the nobles and grandees assembled together and conferred the kingship on Ibrahim.⁴⁵ A curious anecdote is attached to the election. It indicates the mentality of the Afghans. The omras by their common consent at first divided the kingship among the two sons of Sikandar. Ibrahim was to be the ruler up to the frontier of Jaunpur whereas Jalal was to govern

⁴⁴ Elliot, Vol. IV, p. 445; Tarikh-i-Daudi, Persian Text, pp. 35-6; Dorn, History of the Afghans, p. 55.

⁴⁵ Tarikh-i-Daudi, pp. 104-5; Dorn, History of the Afghans, p. 70.

Jaunpur, Behar and Bengal. This unwise step of dividing the sovereignty was averted by the timely intervention of Khan Jahan Lodi, who pointed out to them that it was ruinous to have the sovereignty held by two—this giving rise only to sedition and calamity. After much debate Khan Jahan converted the nobles to his point of view.

In the second Afghan Empire founded by Sher Shah, the Afghan attitude towards succession is more clearly exhibited. After the death of Sher Shah, his younger son Jalal Khan was chosen by the grandees and omras as their king. The elder brother Adil Khan was passed over. The ground on which the choice was unanimously made is worth considering. Jalal, though minor, was an illustrious warrior. Adil, though the elder, was of easy habits. Adil, though trained in the art of government by Sher Shah, seemed to them to be incompetent. Above all, he was at a very great distance—of at least 250 miles. Consequently, on the ground of being a warrior and near at hand. Jalal was unanimously elected to the throne. Jalal hesitated a while and requested the grandees to await his brother. The reply which the grandees gave to him was significant. It shows the attitude of the Afghans towards kingship and succession. According to them, to tarry and delay and enter into long discussion on minority and majority was only productive of the desolation of the empire and injury to the subjects, the sovereignty was nothing but a magnificent present bestowed by the grandees of the empire on any individual they chose, which turn had now fallen to his (Jalal's) lot; for he being present all the omras and disaffected had adjusted their heads to the dictates of his *firmans* and elected him their monarch; and his brother being at a distance of 200 miles, a general uproar and confusion would result from putting off the arrangement of the affairs of the state till his arrival. It was therefore safer that His Highness without delay and procrastina-

tion, should please to mount the throne, and considering this circumstance as a prosperous juncture to preserve the crown, not allow himself to tarry even for a moment. Jalal Khan answered that if all the grandees had actually agreed on that point, there was no doubt that their decree was in accordance with the divine pleasure, and he, in reliance upon it, was ready to take upon himself that important office. They accordingly might make it known to high and low that he was determined strictly to observe his father's institutions and regulations without allowing himself the least deviation, but in promoting the public welfare.⁴⁶

From the above it is evident that the Afghans cared very little for the nomination. Nomination with them did not carry much weight. What mattered to them was their own decision. Grandees of the empire alone could 'bestow the magnificent present of sovereignty' on whomsoever they chose. If they kept the sovereignty within the reigning family, it was out of their courtesy and not because of any obligation.⁴⁷ Thus before Babar's advent into India, the following principles of succession were more or less recognized :—

- (a) The ruler before his death was expected to nominate a successor—usually his nomination was respected.
- (b) The successor was formally raised to the throne by the common consent of the nobles and chiefs.
- (c) A son who was near to the dying king had surer and greater chances of succeeding to the throne.

⁴⁶ Dorn, History of the Afghans, p. 415.

⁴⁷ *Ibid.*, p. 142.

This needs a little comment. The reason is obvious. In those days the rule was entirely personal. It was very difficult to carry on business smoothly without a king even for some time. The death of a king, if he was not immediately succeeded within a day or two, spelt anarchy, and disorder. In the election of Firoz Tughlak to the throne this point was very much emphasized by those who requested Firoz Tughlak to ascend the throne.⁴⁸ One of the reasons that facilitated the accession of Sikandar Lodi was nearness itself.⁴⁹ In the case of Islam Shah Sur nearness was also one of the deciding factors.⁵⁰ This explains why the death of monarchs was kept concealed and Sher Shah's death was made known after the arrival of Jalal Khan—that is, after fully five days.⁵¹

- (d) The omras, grandees and chiefs of the realm began to make themselves felt more in matters of succession. This was due to the influence of Afghan thought. To them nomination was not such an important affair, e.g., the succession of Bahlol, Sikandar and Ibrahim.⁵²
- (e) According to the Afghans even two rulers could rule at the same time. It was due to their allegiance to tribal headship. Fortunately,

⁴⁸ Barani, Tarikh-i-Firozshahi, Elliot, Vol. III, pp. 266-7.

⁴⁹ Dorn, History of the Afghans, p. 55.

⁵⁰ *Ibid.*, pp. 142-3.

⁵¹ *Ibid.*, pp. 55, 142.

⁵² Tarikh-i-Daudi, pp. 35-6 & 104-5; Dorn, History of the Afghans, p. 70.

this could not gain any recognition. This tendency was checked in the very beginning.

So far as Babar was concerned, he had also some views with regard to the problem of succession. They were formed on the basis of the Mongol and Turkish traditions, which have been mentioned above.

His view was that succession to sovereignty was hereditary. He had probably formed this view seeing that the throne of Samarkand after the death of Timur remained occupied only by those who had been descended from Timur. The desire to occupy the throne of Samarkand even after the conquest of India shows his love for the patrimony. It also indicates his adherence to the belief that succession to the sovereignty was hereditary. The letter that he wrote to Humayun, from India, confirmed this view. He was extremely anxious to conquer Samarkand.

In his memoirs, while describing the people of Bengal and their manners and customs he wonders that there was little hereditary descent in succession to sovereignty.⁵³ With regard to the nomination of the successor, Babar could have hardly formulated his views on the basis of his family traditions. Excepting Timur and Shah Rukh no one could nominate his successor, although the sovereignty remained confined to the dynasty.

On this point Mongol traditions were somewhat different. The ruler nominated his successor but he had to be approved by the Kuriltai. The Timurides believed in absolute kingship. Babar could not assimilate this.

Both Changiz and Timur nominated their successor before their nobles and chiefs. Babar also wanted to do that. The ground for nomination had already been prepared in India. Here too kings were anxious to nominate their successor, and the amirs and grandees readily ap-

⁵³ Leyden & Erskine, Memoirs of Babar, p. 311.

proved of those nominations. Babar wanted to establish a hereditary sovereignty. The condition of India at that time was especially suited for this purpose. Even the Afghans had later on begun to favour this tendency. At the accession of Islam Shah after the death of Sher Shah a sentiment that the crown should not be taken away from the reigning family had been expressed by Isa Khan. Other nobles also had agreed to this point of view—the crown should remain in the reigning family.⁵⁴

So on his death-bed Babar nominated Humayun as his successor. The amirs had been called by Babar before he declared the nomination. They were charged to acknowledge Humayun as his successor and to remain loyal to him.⁵⁵ The last words of Babar had a lasting effect. They were regarded as too sacred to be violated. During the wanderings of Humayun at Kandhar, Kamran wanted to have the Khutba read in his name. He requested Hindal, Dildar Begum and Khanzada Begum, but all refused on the ground that Babar had nominated Humayun as his successor and not Kamran. Babar's will should be respected. Later on, on much insistence a compromise was arrived at. What passed between Kamran, Hindal and others with regard to the Khutba is worth mentioning :

" Day after day he urged, ' Read the Khutba in my name ' and again and again Mirza Hindal said, ' In his lifetime His Majesty Firdaus Makani gave his throne to the Emperor Humayun, and named him his successor. We all agreed to this and up till now have read the Khutba in his name. There is no way of changing the Khutba.' Mirza Kamran wrote to Her Highness Dildar Begum, ' I have come from Kabul with you in mind. It is strange that you should not have come once to see me. Be a mother

⁵⁴ Dorn, History of the Afghans, p. 142.

⁵⁵ Gulbadan Begum, Humayunnamah, Persian Text, p. 24; English Trans., pp. 108-9.

to me as you are to Mirza Hindal.' Dildar went to him. He said, 'Now I shall not let you go till you send for Mirza Hindal.' Dildar Begum said, 'Khanzada Begum is your elder kinswoman and oldest and highest of you all. Ask her the truth about the Khutba.' So then he spoke to Atka. Her Highness Khanzada Begum answered, 'If you ask me, well, as His Majesty Firdaus Makani decided it and gave his throne to the Emperor Humayun, and as you, all of you, have read the Khutba in his name till now, so now regard him as your superior and remain in obedience to him.' In short, Mirza Kamran besieged Kandhar and kept on insisting about the Khutba for four months.⁵⁶ At last he settled it in this way, 'Very well. The Emperor is now far away. Read the Khutba in my name and when he comes back read it in his.' As the siege had drawn out to great length, and people had gradually come to cruel straits, there was no help for it ; the Khutba was read. He gave Kandhar to Mirza Askari and promised to give Gaznin to Mirza Hindal. When they reached Gaznin, he assigned the Lawghanat and the mountain passes (Taugayha) to Mirza, and all those promises were false.'⁵⁷

From the above passage it is evident that the nomination of a successor by a king was a matter of very great importance. People attached much value to it. Although Kamran tried his best to dissuade people from the observance of the pledge that they had given to Babar, he practically failed. Hindal and Khanzada Begum always submitted that as Humayun had been nominated by Babar, it was Kamran's duty to obey him and reckon him as his superior and the successor to the throne. Moreover, they had given their word to Babar at his death-bed that they

⁵⁶ Gulbadan Begum, Humayunnamah, E. Trans. pp. 161-2.

⁵⁷ Gulbadan Begum, Humayunnamah, E. Trans., p. 162.

would be faithful to Humayun. They could not go against it. On those two grounds, Kamran's request could not be complied with completely. There is another anecdote related to Humayun's accession. Humayun's abrupt departure from Badakhshan without Babar's permission and his anxiety to be near the person of the king goes a great deal to confirm the inference given above that much depended on the fact of nearness to the king's person at the time of his death. "That fortune and kingdom used to fall to the lot of the present," was not the sentiment of a person who spoke just after the death of Sher Shah.⁵⁸ But it had become the prevalent notion of the people of those days. People respected the man on the spot, obeyed only those who—rightly or wrongly was not their concern—wielded the power. . . . Where people do not know to obey the impersonal authority, any person who wields the authority commands respect and obedience. Order and security become inextricably connected with the king's person. With his physical cessation, everything ceases. So the man who assumes authority immediately becomes the restorer of peace, order and security and thus begins to command obedience and respect. So being near to the person of a dying king, enhanced the chances of succession to a very considerable extent. In the Moghul period that one fact has played a great part in nearly all the struggles for succession. Undoubtedly, there was sufficient ground for Babar's displeasure but Humayun's disobedience was not groundless.

From the accession of Humayun commences another tendency. The nobles who had so much hand in the accession of a ruler, began to lose their power. Their approval imperceptibly transformed itself into an assent. The dying emperor called them and announced to them

⁵⁸ Dorn, History of the Afghans, Isa Khan's Speech, p. 143.

his wish. There is no doubt, although, that the wish was supplemented by a request to stand by the nominated successor. The nobles usually agreed. This change in the attitude of the nobles is probably due to the strength of the successive Moghul Emperors and to the new conception of sovereignty which they introduced into India.

Humayun was succeeded by his son Akbar. To what extent the principle of nomination regulated his succession it is very difficult to say. The discussion below will justify this statement.

There is no direct evidence which may lead us to the conclusion that Humayun had nominated Akbar as his heir-apparent as Babar had done in the case of his own successor. Vincent Smith in his book *Akbar* bases his statement on the authority of Ahmad Yadgar, the author of *Tarikh-i-Salatin-i-Afghana*, and holds that after the battle of Sirhind (June 22, 1555) Humayun formally declared Akbar his heir-apparent.⁵⁹ Ahmad Yadgar in connection with the battle of Sirhind states : " All the Khans displayed on this day great courage and valour, such as it would be impossible to exceed and they obtained their desires. . . . Mohammad Akbar came victorious into His Majesty's presence and made the customary congratulations. His Majesty honoured that lamp of brilliancy with an ornamented khilat and a jewelled crown, and made him happy by granting him the high title of heir-apparent. He also gave him 20 elephants and 100 horses out of the spoil. The munshi dispatched firmans describing the victory in every direction, and they attributed the success to the skill of the Prince of the world, and the valour of servants.⁶⁰ Count von Noer also holds the same view. On what authority he bases his statement, it is

⁵⁹ V. Smith, *Akbar*, p. 29; Ahmad Yadgar, *Tarikh-i-Salatin-i-Afghana*, translated in Elliot, Vol. V, p. 58.

⁶⁰ *Ibid.*

difficult to say. He holds that after the battle of Mach-chivara Akbar was declared heir-apparent.

One feels a little diffident in hazarding such a positive statement on the basis of only one authority. Although there is nothing to contradict the statement, yet there is also nothing to corroborate it. It is difficult to believe Ahmad Yadgar in face of other contemporary historians, who have written about the battle of Sirhind and its effects. Ahmad Yadgar makes references to Tabakat-i-Akbari in his book. So the book must have been written after the completion of Tabakat-i-Akbari. Elliot and Dowson conclude that the Tabakat must have been written after the year 1001-2 A.H.; the probability is that it was completed soon after the latter date and before the Makhzani-i-Afghana, which was written in 1020 A.H. It is said that so far as the reign of Humayun is concerned Ahmad Yadgar has copied Tabakat-i-Akbari, word by word, excepting this passage. Why this discrepancy?

Tabakat-i-Akbari is a standard work. All the great writers of Persian history have based their work on it. Badaoni has expressed his indebtedness in so many words. Farishta states that of all the histories he consulted, it is the only one he found complete. Maasir-ul-Umara says, "this work cost the author much care and reflection in ascertaining facts and collecting materials, and as Mir Masum Bhakari and other persons of note afforded their assistance in the compilation, it is entitled to much credit. It is the first history which contains a detailed account of all the Mohammadan princes of Hindustan. From this work Mohammad Kasim Farishta and others have copiously extracted."^a Such being the credit of the work, from which Ahmad Yadgar has copied the history of Humayun, it becomes difficult to dismiss the narration of the Tabakat

^a Elliot, Vol. V, pp. 177-8.
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unnoticed. He makes a mention of the battle of Sirhind and gives a description of the division of the army and the manner of the attack. He even expresses his satisfaction at the dauntless courage and the most determined resolution which the nobles exhibited in the battle. According to him the Afghans were defeated owing to a lack of courage. Sikandar fled after the battle. All approached Humayun to congratulate him. Under his orders a despatch of the victory was drawn up in which the honour of the victory was ascribed to Prince Akbar and that was circulated in all directions.⁶²

Nowhere in the above account has it been mentioned that Humayun nominated Akbar as his heir-apparent. He might have done so before or even afterwards, but it is difficult to say that he nominated him on this occasion. He gave the credit of the victory to Akbar, but according to the *Tabakat* mentioned nothing about the nomination of Akbar as his heir-apparent. Jauhar is another contemporary writer. He wrote the *Tazkarah-el-Vikayat* in 1587. He also gives a description of the battle of Sirhind but does not mention that Humayun, after the battle, declared Akbar his heir-apparent. He is altogether silent. He does not mention the rewards that were distributed after the battle of Sirhind.⁶³

Abul Fazal, who has spared himself no pains in the collection of facts and figures, does not mention this incident in connection with the battle of Sirhind. He gives a graphic picture of the famous battle, but omits the one fact of nomination. He devotes almost a full page to the decision of one question—in whose name should the proclamation of victory be recorded? There were two claimants: Abul Maali and Bairam Khan. “But Humayun at last became by inspiration cognizant of the truth, and ordered

⁶² *Tabakat-i-Akbari*, Persian, p. 221; Elliot, Vol. V, pp. 238-9.

⁶³ *Tazkarah-el-Vikayat* (E. Trans. by Beveridge), pp. 116-7.

the victory to be inscribed in the name of His Majesty Shahinshah and thereby gratified the loyal far and near."⁶⁴ Abul Fazal also mentions only as much about the victory as Nizamuddin. Ferishta who followed the Tabakat does not mention the nomination. He admires the courage which Akbar exhibited in the battle. But he does not include his name in the list of those whom Humayun gave rewards after the battle. Bairam Khan, to whose valour and talent the king was principally indebted for his restoration, was rewarded with the first office in the state and had princely estates assigned to him. Tardi Beg Khan was appointed governor of Delhi, Agra was assigned to Sikandar Khan, Oozbek and Ally Kooly Khan were sent to Meerut and Sambhal, to which provinces they departed with considerable speed.⁶⁵

So in all the contemporary writings of the period we do not find any mention of the fact that Humayun nominated Akbar as his heir-apparent after the battle of Sirhind. Ahmad Yadgar alone mentions this. But as he bases all his narration of Humayun's history on the Tabakat, it seems rather difficult to associate the nomination of Akbar as an heir-apparent with the victory of Sirhind. It remains an isolated fact uncorroborated and unconfirmed by other historians. Let it not be understood, from the above, that Humayun did not nominate Akbar as his heir-apparent at all. We do not say this. Our only submission is that on the occasion of the battle of Sirhind and after its victory Humayun does not seem to have made any such declaration. Ahmad Yadgar's statement is not altogether devoid of truth. There is indirect evidence to prove that Humayun must have nominated Akbar as his successor. Only the time and place of his nomination is not known to us. That he did not, rather could not, appoint a suc-

⁶⁴ Beveridge, Akbarnamah, p. 633.

⁶⁵ Briggs, History of the Mohammadan Power, Vol. II, p. 117.

cessor at the close of his years is quite evident. He met a very unexpected and unusual death. After his fall he remained almost unconscious till his very end. So if he appointed any one as his successor, he must have done that during the period intervening between the departure of Akbar after Sikandar, and his death. According to Abul Fazal he had premonitions of his death and always thought that his end had drawn near.⁶⁶

It is most probable that Akbar had been nominated during this period. Forebodings of an approaching end are a cogent reason for the nomination of a successor. He had been seated on the throne of Delhi and he could easily nominate any one as his successor. The battle of Sirhind was decisive no doubt, but it did not make Humayun secure in his position as an emperor. It took him some time to settle. Not before six months after the battle of Sirhind, could Humayun dare nominate a successor. Ahmad Yadgar put the nomination and victory together simply because within a very short time of the victory the Emperor had passed away. It was difficult to follow the sequence of events and make a subtle distinction.

There are two remarkable passages which indicate that Akbar had been nominated as the heir-apparent. One is in the Tarikh-i-Humayun known as Mukhtasar by Baizid and the other in Abul Fazal's Akbarnamah. The first one indicates the wish of the Emperor which he always had in mind with regard to Akbar. the other shows the fulfilment of that wish.

In connection with the battle of Sirhind, Baizid relates that Tardi Beg was appointed in Lahore ; Sikandar was given Agra : Ali Quli Sultan Shaibani was appointed towards Sambhal, etc. After this begins the memorable passage. He says : "It has always been his (Humayun's) ambition to leave this sordid world. He had resolved

⁶⁶ Beveridge, Akbarnamah, Vol. I, pp. 652-3.

within himself before God that after winning back the country of India which had been his patrimony and which had been lost simply because of the enmity of and discord among his brothers, he would wash his hands of all things and entrust the entire kingdom to Shahzada Alman Jalaluddin Mohammad Akbar Mirza, and would himself retire into the company of the Darwesh, the learned and the wise.”⁶⁷

This resolve is similar to that of Babar who wanted to retire to the gold-scattering garden after handing over the throne to Humayun. Of all his wishes this alone had remained unfulfilled during his physical fitness. When he fell mortally ill he nominated Humayun as his heir-apparent. Though he could not retire to the gold-scattering garden, yet God bestowed on him a better garden than that of Aram.⁶⁸ When the wish of Humayun was fulfilled, we cannot say. The probability is that he did nominate Akbar as his heir-apparent. The second passage of Abul Fazal in the Akbarnamah confirms this :

“ One of the wondrous flashes of his (Akbar’s) intelligence was that in the middle of that very day (the day of the accident, not of the announcement) he had said to some of his suite that a great misfortune would happen to an eminent man, that probably he would die. The loyalists who were on the spot endeavoured to conceal the dreadful occurrence and took measures to send information to the heir-apparent of the Masnad of the Khilafat and to collect the principal officers who had obtained leave to various parts of the kingdom. With extreme prudence they kept this life-destroying event from the public for seventeen days.”⁶⁹

⁶⁷ Baizid, Persian MSS., p. 158.

⁶⁸ Baizid is also a contemporary writer. He wrote in 1587 with the view to help Abul Fazal in the preparation of his book.

⁶⁹ Beveridge, Akbarnamah, Vol. I, p. 658.

From this passage it is evident that Humayun's wish had been fulfilled and he had declared Akbar as his heir-apparent. For Abul Fazal mentions the word 'heir-apparent to the throne' and not Shahanshah, etc., that he up till now used. This shows that Akbar had been nominated as heir-apparent by Humayun and every official in the realm tried his best to have the will of the Emperor carried out loyally and literally.

It can be argued that Humayun did not appoint an heir-apparent. After his death the nobles enthroned Akbar as he was nearer and elder than Hakim. But it does not stand criticism. We do not find any mention of such a formal meeting in which the nobles assembled and decided for Akbar. If Akbar had not been nominated as heir-apparent a question would have naturally arisen as to who should be the successor. This had happened in the case of so many before. Sher Shah had died without nominating any one. His successor was appointed by discussion. At least for some time this question of succession agitated the minds of the nobles. This happened in the accession of Firoz Shah. Mohammad Tughlak had also died without appointing an heir-apparent. But these can be dismissed on account of their being instances of the Muslim kings in India. No such thing happened amongst the ancestors of Babar. We have ourselves contended that no such thing as the nomination of an heir-apparent obtained amongst the Moghuls before their advent into India. . . . leaving of course Timur and Shah Rukh. The practice of nominating an heir-apparent was adopted by the Moghuls after their acquisition of India. Babar adopted this with a view to keep the sovereignty hereditary in his own family.⁷⁰

He complains that there is no such thing as hereditary sovereignty in India. He had also observed that

⁷⁰ Leydon & Erskine, *Memoirs of Babar*, p. 311.

the principle of nominating an heir-apparent was more or less recognized in India. He took advantage of this with a view to keep sovereignty intact in his family. Therefore he took great care in nominating Humayun as his successor, so that people might not rise against him after his death. So there is every probability of Humayun's having followed his father's example of nominating a successor. The attitude which the nobles took at the death of Humayun and the manner in which they behaved force us to conclude that Akbar must have been appointed as an heir-apparent. Immediately after the fall a man was sent to Akbar to intimate to him this sad incident. After that a man was sent with the heavy news. At Kalanaur the news was broken and he was raised to the throne as the successor with the help of Bairam Khan, Khankhana and other nobles.⁷¹ There was no discussion, no opposition. Akbar's claim was already recognized. The nobles and others attended the accession ceremony. The calmness, the secrecy, the agreeableness with which the accession of Akbar was brought about shows that at least before Humayun's death the nobles and others were aware of Akbar's claim to succession as an heir-apparent. That is why everything could be done so smoothly and secretly. There is another incident connected with the accession to corroborate this view.

Abul Fazal says that those who were present at court and the counsellors of the threshold of the Khilafat⁷² . . . and others including Tardi Beg all assembled together and on the 28th of the same month (11th February, 1556) they recited the Khutba in the famous name and lofty titles of

⁷¹ Tabakat-i-Akbari, Persian Text, pp. 222, 242; Elliot & Dowson, Vol. V, p. 241.

⁷² Names of those present: (1) Ali Quli Khan, (2) Khizr Khwaja Khan, (3) Latiff Mirza, (4) Khizr Khan Hazara, (5) Qunduq Khan, (6) Qambar Ali Beg, (7) Ashraf Khan, (8) Afzal Khan, (9) Khwaja Husain of Merv, (10) Mir Abdul Hai, (11) Peshrau Khan, (12) Mihtar Khan, (13) Tardi Beg Khan.

the Khedive of the age, and so healed and mended the distracted world and gave the terrene and terrestrials a message of enduring restoration.⁷³ This happened at Delhi three full days before the accession of Akbar at Kalanaur. He was raised to the throne at Kalanaur on the 14th February, 1556.⁷⁴ This reading of the Khutba three days before clearly indicates and conclusively establishes that everybody was aware of Akbar's succession to the throne. Humayun must have proclaimed his decision sometime and somewhere.

From the above discussion the position and the power of the nobles of the realm can also be deduced. Humayun had come to the throne through the help of the nobles, etc. Naturally they were recipients of greater honour and greater respect. Immediately after the battle of Sirhind each one of them according to his importance and place got rewards and awards from Humayun. They became more powerful. But all their strength was neutralized and minimized owing to their mutual jealousies and sordid ambition for power. From a body of powerful nobles who had some say in the matter of succession, they had become a loyal group of supporters of the throne, ever ready to carry out the behest of the deceased Emperor. They had no amendments to make after the nomination of the king. All the notables, Khans, Begs and Mirzas assembled together three days before, read the Khutba in the name of Akbar and expressed their loyalty and obedience. The heir-apparent was absent. Even in his absence Akbar was recognized as a king. It would be said that all this was the show of Akbar's supporters. But we do not find any opposition or counter proposition on the occasion. There were rebellions no doubt, but they were inevitable

⁷³ Beveridge, Akbarnamah, Vol. I, p. 658.

⁷⁴ *Ibid.*, Vol. II, p. 5.

in the beginnings of an empire. Moreover, no government is free from them. So from Akbar's accession we mark among the nobles a ready acquiescence in the ruler's will.

There is another tendency to be marked in connection with Akbar's succession. Had Akbar been present at the time of Humayun's death, there would have been no need of keeping the death of Humayun a secret. As has been pointed out above, the absence of Akbar from Delhi would have been taken advantage of by some one and Akbar's chances of succession would have become a bit more remote. Any one who had appeared on the spot with a role of authority and sufficient strength to enforce it, would have been obeyed. So that the throne may not appear as vacant in the eyes of the subjects, the nobles took so much precaution. Babar had already written down in his memoirs that the people of Bengal say, "We are faithful to the throne, we are obedient and true to it." The nobles as well as the Moghul princes were fully aware of this. So the princes tried their best to be near the throne at the close of a king's career. This one fact was a great deciding factor in their fortunes.

The question of Jahangir's succession is not so disputed. Akbar had nominated him as his heir-apparent before his death. But there is one point which deserves a little consideration. The exact time of declaring Salim heir-apparent is not definite. Count von Noer, in his book Akbar, holds that Salim had been nominated an heir-apparent at the end of the year 1598. Akbar had tried to prepare Salim for his future career by employing him in various provincial governments. Up to the time of the Royal march to the Dakhin at the end of 1598, Salim filled one such post at Allahabad. At this time the Prince was declared successor to the throne and appointed Viceroy of Ajmer. He had in these posts the opportunity of creating for himself a vocation which might have reconciled him to

the lot of an heir-apparent, but his vanity could not brook the second place.⁷⁵ Von Noer makes this statement on the authority of Elphinstone. In his *History of India*, Elphinstone says that on his departure for the Deccan, Akbar declared Salim his successor, appointed him Viceroy of Ajmer and committed to him the conduct of the war with the Rana of Udaipur sending Raja Man Singh to assist him with his arms and counsels.⁷⁶

Vincent Smith and others, whose names will be given later on, hold that Akbar conferred on Salim the administration of Ajmer, but are silent on the question of his declaring Salim as his heir-apparent. In such circumstances it is very difficult to come to any definite conclusion. But a closer examination of the Persian authorities will reveal that Elphinstone and Von Noer's statements are nearer the truth. The probability is that Akbar designated Salim as heir-apparent at the time of his appointing him as the Viceroy of Ajmer.

Among the chief contemporary authorities may be mentioned the Akbarnamah, the Takmil Akbarnamah, Tabakat-i-Akbari, Muntakhabin-ut-tawarikh, Wikaya, Asad and Iqbalnama. Tabakat-i-Akbari and Muntakhabat do not deal with the period with which we are concerned. They finish their narrative earlier. Asad mentions incidents of but few years of Akbar's reign, starting with the murder of Abul Fazal. Jahangir was declared heir-apparent before that.

Motamid Khan's Iqbalnama begins with Jahangir's succession. The only book which remains to be considered is Akbarnamah and its Takmil. Abul Fazal who mentioned every detail unfortunately does not mention anything about the declaration of Salim as heir-apparent. He says that, "when Prince Sultan Danial was sent off to conquer

⁷⁵ Von Noer, *Akbar*, p. 372.

⁷⁶ Elphinstone, *History of India*, p. 514.

the south and delayed somewhat on the road, His Majesty conceived the idea of hunting in Malwa so that he might urge on his son to greater activity in the carrying out of orders. On 6th Mihr (16th September, 1599) he made over the charge of Agra to Qulij Khan and after 4 hours and 24 minutes, mounted his rapid steed and went off on his expedition to Deccan. "Sultan Khusru, Sultan Parvez, Sultan Khurrum and many ladies accompanied him. On this day the Prince Royal obtained leave to go to Ajmer. The gracious sovereign was continually increasing his kindness to him, but he from drunkenness and bad companionship did not distinguish between his own good and evil."⁷⁷

Abul Fazal is strangely silent on the question of Salim's nomination as an heir-apparent. Ferishta, who also wrote in 1612, is significantly silent on this point. He says : "Akbar also in the year 1008 marched in person to the south, leaving his dominion in the north under the charge of Prince Royal Mohammad Salim Mirza."⁷⁸ Maasir-i-Jahangiri which was written in the third year of Shah Jahan's reign mentions at great length and in so many words the declaration of Prince Salim as heir-apparent.

Khwaja Kamgar Ghairat Khan, the author of the work, mentions this fact a bit indirectly. We have to infer. But the inference is not at all stretched. It is obvious and simple. The passage referred to is as follows :

لواں کیوں سے عرشِ اُستانی بتسخیر دکن و دستوری یافتیں

⁷⁷ Akbarnamah, Vol. III Part XII (Translation), p. 1140. The translation Prince Royal seems to be misleading. The correct translation would be eldest or the eldest prince, for in the Persian text the phrase is بیڑگ شاهزادہ - بیڑگ شاهزادہ را دستوری صوبہ اجمیز دار دند -

⁷⁸ Briggs, Vol. II, pp. 277-8.

حضرت شاهنشاهی باستیصال را نا مفهور چون در سال هزار و هفت
هجری از عرائض دولت خواهان بوضو پیوست که تسخیر ملک دکن
بی نهضت رایات جهان کشای حضرت عرش آشیانی صورت پذیر نیست
بتاریح ششم شهر که مختار انجام شناسان وقت بود بنفس فیض
بدانصوب توجہ فرمودند و صوبه اجمر را تینماً و تبر کا بتیول حضرت
شاهنشاهی مقرر فرموده، اجهه مان سنگهه و شاه قلی خان محروم
و بسیاری از امراء در ملازمت آنحضرت تعین نموده در همین ساعت
مسعود به برکنندن بیح فساد را نا شرف رخصت ارزانی داشتند -
و غرض از اختیار مفارقت آنکه چون موکب اقبال بمالک
دور دست نهضت میفرماید هم مستند خلافت از شاهزاده و لیعهد
حالی نباشد و هم حدود متعلقه، پسپر عساکر کیوان شکوه گردد⁷⁹

Kamgar mentions it clearly that Akbar conferred Ajmer on Salim by way of benediction and with blessings. Akbar had decided to go to the Deccan. But he also wanted that the throne should not be vacant in his absence. The Deccan was very far off. Some one should be near the throne. He nominated Salim as his heir-apparent, and gave him the jagir of Ajmer. Salim's appointment at Ajmer in the opinion of the author would serve two purposes. Akbar's apprehension with regard to the vacancy of the throne in his long absence would be removed. Ajmer being very near Delhi Salim, the heir-apparent, would be in the vicinity of the capital. So, for all practical purposes Salim would be the man on the spot. Akbar could easily absent himself on his Deccan conquest

Posting at Ajmer would be beneficial in another way as well. Akbar wanted to conquer the Rana. This purpose would also be achieved. With these two ends in view Akbar

⁷⁹ Maasir-i-Jahangiri, p. 22.

gave Salim the jagir of Ajmer and declared him the heir-apparent. Kamgar does not say explicitly that he appointed him as the heir-apparent. But his words indicate that Akbar thought Salim to be the Prince heir-apparent.

Khafi Khan who bases the narration of Salim's rebellion almost on Maasir-i-Jahangiri makes this quite explicit. There is no doubt that he wrote in the 18th century, yet he can be relied upon. He writes:—

کہ بعدہ کلادرسن ھزارو ھشت ھجری رایت ظفر اثر عرش
اشیانی براے تسلیخیر دکھن بر اغراشتند - بادشاہزادہ محمد سلیم
را مخاطب به شاہنشاہی ساختہ تسلیم ولیعهد فرمودہ صوبہ
اجمیر را در تیول آن بادشاہزادہ والا گھر عطا نمودہ بمهم استیصال
چتور نامزد فرمودہ راجہ مان سنگھہ خسر پورا پادشاہزادہ و شاہ
قلی خان کہ از امراء کار طلب نامدار بودند با امرای رزم
آزمائی دیگر در، کاب بادشاہزادہ تعین نموده بغایت فیل و جواہر
و لک اشرفی مقتضی ساختہ، خصت فرمودند⁸⁰

Khafi Khan states definitely that Salim was declared heir-apparent and the subah of Ajmer was given to him as a jagir. It is difficult to refute Khafi Khan's assertion. Apart from the two reasons given by Kamgar, there are other things in favour of the statement. Salim was given the charge of Ajmer in the year 1599. According to calculation this would be the 44th year of Akbar's reign. He had become sufficiently old, though not so weak. It would not have been uncalled for, but in the fitness of things, if he appointed his successor. Life is so uncertain and especially for one who is so much advanced in years.

⁸⁰ Khafi Khan, Muntakhabullubab, Bibliotheca Indica Ed., p. 216.

Above all, Akbar had undertaken the Deccan campaign. It was a very long and arduous campaign. It meant a long and continued absence from the capital. In a country ruled by an absolute monarch the presence of the sovereign should be felt every moment. Babar in his memoirs had already depicted the character of the people of Bengal. He says: "Nay this rule obtains even as to the royal throne itself ; whoever kills the king and succeeds in placing himself on the throne is immediately acknowledged as king. All the amirs, wazirs, soldiers and peasants instantly obey, submit to him, and consider him as being as much their sovereign as they did their former Prince, and obey his orders as implicitly. The people of Bengal say, 'We are faithful to the throne; whoever fills the throne, we are obedient and true to it.' "²¹ Akbar knew this very well. He did not want to give any occasion for the display of this dangerous temperament. That is why he declared Salim his successor and posted him near Delhi, at Ajmer. Von Noer has rightly said that this would have trained Salim in the art of government. But woe to the Prince. He failed to avail himself of this opportunity.

There is another probable reason why Akbar took this opportunity to declare his successor. He had reigned about half a century. This was almost unprecedented in his dynasty. He must have been conscious of this long period of one man's rule. That he would not live very long must have been brought home to him by so many transitory things of the world. Death the most certain, yet the most uncertain thing, was slowly approaching. It must come, it might come—at any moment. Moreover, he had planned a campaign, and waged a war. He was going to conduct it. As a warrior he wanted to go prepared for the worst. In war "Death" is the most

²¹ Leyden & Erskine, Memoirs of Babar, p. 312.

familiar figure, whom nearly everyone expects to meet. The expectations of an old man stand greater chance of fulfilment. It is said they have already one leg in the grave. Akbar was fully aware of the situation. This is why we are led to conclude that he must have availed himself of this opportunity to declare Salim, the child of so many prayers and privations, his successor.

It may be argued that the fact that Abul Fazal does not mention this fact vitiates our conclusion. Abul Fazal had an exquisite mastery over details. He could not have forgotten to mention such an important event in the life of a Prince who eventually succeeded Akbar. A few facts will dispel the doubts. Before the announcement of Salim as an heir-apparent, both Abul Fazal and Salim had become inimically disposed towards each other. Each one of them looked upon the other as an impediment to his future prospects. What was meat to one became poison to the other. Abul Fazal deliberately and arrogantly ignored him. Salim sordidly shunned and hated him. In Akbarnamah Abul Fazal mentions the misunderstanding that existed between him and the prince. The passage also exhibits the agitated and disturbed mood in which it was written. Abul Fazal thinks that the mind of Akbar also had been poisoned against him. He consoles himself in the end that "If there is a place for mortals, and you can always retire there, why are you so much troubled and why do you cut away the thread of knowledge? The tongues of ill-wishers cannot be stopped. Do you take the right path so far as you know it. Your choice is to do God's work—what matters it about this man or that man?"⁸² A little above the passage he states that owing to the pressure of work and constant occupation it

⁸² Akbarnamah, Vol. III, Translation, p. 1106; Persian, p. 741.

was difficult for Abul Fazal to pay his respects to Salim. This omission on his part had enraged the Prince and poisoned his mind against Abul Fazal. The passage runs thus: "By good fortune he (Abul Fazal) was awakened by a lacerating blow and took up anew the task of spiritual amendment. Inasmuch as the world's Lord kept him much employed, he was unable to attend to other matters. On this account he was unable to perform fully the outward service of attending upon the Prince Royal and awkward explanations were not successful. From not fully considering the matter he (Salim) became somewhat angry, and base envious people had their opportunity. The anger of that hot-tempered one blazed forth and meetings were held for troubling his heart. Many untrue reports were (sold) as untruths."⁸³..... This is how Abul Fazal stood related to Salim in the 43rd year of Akbar's reign, i.e., 1598..... Later on Abul Fazal says that the misrepresentation against him proved successful, as a result of which he was sent off to bring Sultan Murad. He says: "Inasmuch as the writer of the noble volume always held to his own opinion without respect of person and represented in an eloquent manner what was good for the state, those who sought for an opportunity and were crooked in their ways, represented their own interested views. In consequence of their intrigues I was sent off on the 25th Dai (about 5th January, 1599), to bring Sultan Murad."⁸⁴

From the above quotation it is abundantly clear that a party was in existence which was dead against Abul Fazal. That Salim had no favourable bias towards Abul Fazal is also manifest. They suspected each other. Their mutual suspicion was not only casual but studied and deep-rooted. At least Salim regarded Abul Fazal as a great check to his

⁸³ Akbarnamah, Vol. III, Translation, p. 1104; Persian, p. 740.

⁸⁴ *Ibid.*, Translation, p. 1119.

advancement. He was afraid even about his succession. According to his confession in the Memoirs, Abul Fazal seemed to stand between him and the Royal throne. He depicts his true feelings towards Abul Fazal at that time very candidly and with a touch of brutal frankness. He says: "I promoted Raja Bir Singh Deo, a Bundela Rajput, who had obtained my favour and who excels his equals and relatives in valour, personal goodness, and simple-heartedness, to the rank of 3,000. The reason for his advancement and for the regard shown to him was that near the end of my revered father's time Sheikh Abul Fazal, who excelled the Sheikhzadas of Hindustan in wisdom and learning, had adorned himself outwardly with the jewel of sincerity and sold it to my father at a heavy price. He had been summoned from the Deccan, and since his feelings towards me were not honest, he both publicly and privately spoke against me. At this period, when, through strife-mongering intriguers, the august feelings of my revered father were entirely embittered against me, it was certain that if he obtained the honour of waiting on him (Akbar) it would be the cause of more confusion and would preclude me from the favour of union with him (my father). It became necessary to prevent him from coming to court."⁸⁵

That Abul Fazal "had reported to His Majesty some of the youthful indiscretions of the Prince Salim Mirza the heir-apparent" is mentioned in Inayatullah's *Takmil Akbarnamah*⁸⁶.....Kamgar Husaini in his *Maasir-i-Jahangiri* takes the same view. He says that Abul Fazal "had become proud of his position and acted with rancour and animosity against his master's son. He often said to the Emperor both publicly and privately that he knew

⁸⁵ Roger & Beveridge, *Memoirs of Jahangir*, pp. 24-5.

⁸⁶ Von Noer, p. 385; Elliot, Vol. VI, p. 106.

none but His Majesty and would never entreat or flatter any person, not even the Eldest Prince. He had well assured the Emperor of the firmness of his sentiments in this particular In defiance of all that he heard he considered that the Sheikh was his friend and that he was also cordially disposed towards the Prince ⁸⁷ Later on the author says that when the news of the calling of Abul Fazal reached the Prince, that master of prudence and scholar of the supreme wisdom at once reflected that if the Sheikh should ever arrive at court, he would certainly estrange His Majesty's mind from the Prince by his misrepresentations. He reflected also that he would never be able to find his way to court, so long as the Sheikh should remain there, and that he would necessarily be excluded from the enjoyment of that consummate happiness. In these circumstances, it was expedient to take measures to arrest the evil before it could occur.⁸⁸

The object of these long quotations is obvious. They tell us that no good relations existed between the Prince and Abul Fazal; that the seed of misunderstanding and mutual rancour and recriminations had been sown long ago. Even before the appointment of Salim to the subah of Ajmer, we find traces of estrangement—neither was interested in the advancement of the other. Every opportunity was utilized to belittle each other. In the absence of mutual regard and in the presence of mutual ill-will and animosity we get a clue to the omission which Abul Fazal made in not mentioning the name of Salim as heir-apparent.

⁸⁷ Elliot, Vol. VI, pp. 442-3.

⁸⁸ Elliot, Vol. VI, p. 443; Maasir-i-Jahangiri, Persian MS., Allahabad University Library 44544, p. 31. The two passages dealing with the vainness of Abul Fazal and his attitude of spitefulness towards the Prince are not mentioned in the Allahabad University Library MS. It deals only with the one which tells us that Salim feared lest the presence of Abul Fazal might ruin his chances.

In connection with the appointment of Salim to the subah of Ajmer, Abul Fazal significantly remarks: "The gracious sovereign was continuously increasing his kindness to him, but he (Salim) from drunkenness and bad companionship did not distinguish between his own good or evil."⁸⁹ Abul Fazal does not mention explicitly the form of kindness. The kindness was the appointment of Salim to the subah of Ajmer and the declaration of Salim as his successor or heir-apparent.

Why Ferishta failed to mention the declaration of Salim as successor it is difficult to understand. But one thing is very obvious. The history of the last six or seven years of Akbar's reign he has dismissed in less than six pages (278—280). It is idle to expect from him details and much less the accurate ones. He is completely silent on Salim's rebellion and mentions in a very perfunctory way the murder of Abul Fazal . . . But even in such a short and succinct description of the latest period of Akbar's reign, he writes a very pregnant sentence in connection with Akbar's departure for the South. He says that Akbar also in the year 1008 marched in person to the South leaving his dominions in the North under the charge of the Prince Royal, Mohammad Salim Mirza."⁹⁰ That the Prince was put in charge of the northern dominions is held by Kamgar and others, but in other words. It is another way of putting the same thing. So that the throne might not be vacant in Akbar's absence, Akbar declared Salim his heir-apparent and put him in charge of the northern dominions. The omission of the word 'heir-apparent' is made by later writers, Kamgar and Khafi Khan.

Khulasat-ul-Tawarikh is also silent on the point of

⁸⁹ Akbarnamah, Vol. III, Translation, p. 1140; Persian, p. 763.

⁹⁰ Briggs, Vol. II, pp. 277-8.

Salim's being declared an heir-apparent. He does not mention even the fact of Salim's appointment to the subah of Ajmer. That he got this as a jagir is also not mentioned. He only says that when Akbar proceeded towards the Deccan, Salim had been appointed to the task of conquering the Rana, and that Salim being encamped in the beautiful plot of Ajmer, was planning the means of destroying the Rana.⁹¹ No comment is required on this silence. Kamgar being contemporary is more reliable in this respect Khulasat-ul-Tawarikh was written almost six decades later.

In the days of Akbar the system of nominating an heir-apparent had come to stay. The king and the people alike attached great value to it. The declaration of Salim as an heir-apparent took place twice. Salim was uncertain about his succession till the very last breath of Akbar. The declaration of Salim as an heir-apparent was made no doubt, but it was also one of the possibilities that Akbar might withdraw his declaration and nominate some one else. The declaration depended on the sweet will of the Emperor. There was no one to share this right with him. This is the chief reason of Jahangir's restlessness. As has been pointed out above, Jahangir was conscious of his faults. He was also aware of the king's displeasure. He had rebelled and worse than that had murdered his (Akbar) dearest friend Abul Fazal, the main prop of his kingdom. This one incident had made the chances of Jahangir's succession very remote. He had begun to doubt the value of the first declaration.

The reconciliation between the father and the son was brought about by the intervention of Salima Begum and Mariam Makani. Jahangir fell at the feet of his father, who forgave all his faults and gladly embraced him. All

⁹¹ Persian, p. 255. Maasir-i-Jahangiri, pp. 35-6.

the presents of Salim were duly accepted and so that his heart might rest assured he was declared heir-apparent for a second time.⁹²

The Prince Royal begged for the elephant (Pavan) which was unique for good disposition and swiftness. His Majesty graciously granted his request. The generous Shahinshah in order to capture the terrified heart of the Prince took his turban off his head and placed it on the Prince's head. This was an omen of his adoring the crown and the throne. Though the Khaqan did not approve of the Prince Royal succeeding him, yet he involuntarily put the crown of dominion on a head which had been made fit for the diadem of rule and the auspicious Huma spread its shade.⁹³

The significance of the above passage is obvious. Akbar after the murder of Abul Fazal had almost decided to supersede Salim. At any rate he was not enthusiastic about this succession. He did not very much approve of it. It can also be easily presumed that Akbar's intention in this respect was somewhat known or made known to Salim. The news of supersession was enough to terrify him. People also were aware of this. That is why immediately after the reconciliation Akbar took steps to free Salim's mind from the lurking suspicion. He placed his turban on Salim's head and told him the good news of his succession.⁹⁴

⁹² Khafi Khan, *Muntakhabullubab*, p. 225.

⁹³ Akbarnamah, Vol. III, English Trans., p. 1223; Persian, p. 820. The translation of two words seems to be incorrect. Prince Royal has been put for the elder prince. 'Pavan' has been translated to signify holy. I think it should be 'air.' The Hindi meaning is 'air.' As the elephant was very swift, therefore it must have been named 'air.'

⁹⁴ Maasir-i-Jahangiri, pp. 35-6.

دست مبارک از فرق مقدس خود به گرفته بر سر اشرف

Khafi Khan tells the same story and admits in so many words that the announcement of Salim as an heir-apparent was made afresh and was confirmed.⁹⁵

From the two Persian passages quoted in the foot-note one can establish that Akbar had almost decided to go back on his last announcement, otherwise there was absolutely no reason of making a fresh announcement. That was done with a view to appease Salim's mind and contradict his chance statement if he had made any against the succession of Salim.

Who was the probable candidate for the throne? Salim stood unrivalled so far as his brothers were concerned. Murad was already dead and Daniyal was nearing his end. It is said that Khusru, son of Salim, was the man in Akbar's troubled and agitated mind.

Price, in his book *Jahangir*, mentions this definitely. They say it is unreliable. The passage is as follows:—"I am compelled to add that under the influence of his displeasure on this occasion my father gave to my son Khusru over me every advantage and favour explicitly declaring that after him Khusru should be king."⁹⁶

The passage is missing from the Memoirs of *Jahangir* translated by Rogers and Beveridge. Salim does not mention his supersession in connection with Abul

شاہنشاہی ذهادند و نوید جانشینی، ابگوش امید آن خورشید
آسمان سلطنتی، سانیدند -

⁹⁵ Khafi Khan, *Muntakhabullubab*, p. 225.

، از سر دو نوید ولی عهدی بالاستقلال نمودن (ا سامعه
افروز عالمیان ساخته حکم بلند نمودن او از شادیانه فرموده از
صدای کوس عشرت افرا گوش هر همکاران منافق و هوا خواهان
موافق نبرساختند -

⁹⁶ Autobiographical Memoirs of the Emperor *Jahangir*, translated by Major David Price, p. 56.

Fazal's murder.⁹⁷ It is very difficult to depend on the above passage. It is not corroborated.

Khulasat-ul-Tawarikh, in connection with Khusrus's rebellion, mentions a few sentences which lead us to the conclusion that Akbar had Khusrus in his mind.

پور یزگ آنحضرت بسبب صحبت خوشامد گویان کور باطن
خیال سلطنت در سر داشت چه حضرت بادشاه غفران پناه
در زمان رحلت فرموده بودند که شاهزاده سلطان امکمدم سلیم
عیش دوست است قابلیت سلطنت ندارد - و سلطان خسرو
پرسش بجمعیع خوییها آراسته و قابل خلافت است - و باین
تقربیب مالیکخولیا در دماغش جاگرفته همیشه از خدمت پدر والا
متوجه او رسیده میبود⁹⁸

The passage states indefinitely that Salim—a pleasure-seeker—did not possess the capability of ruling an Empire. On the contrary, his son Khusrus was an accomplished young man efficient and capable of holding the throne. This had entered into Khusrus's head and he was ever ready to rebel. Asad Beg in his *Wikaya* mentions a conspiracy that was headed by Man Singh and Khan-i-Azam against Salim. The object of the conspiracy was to make Sultan Khusrus Emperor.⁹⁹ The Khan-i-Azam and Raja Man Singh sat down and calling all the nobles together, began to consult with them and went so far as to say: "The character of the high and mighty Prince is well known and the Emperor's feelings towards him are notorious for he by no means wishes him to be his successor.¹⁰⁰ We must all

⁹⁷ *Ibid.*, p. 25.

⁹⁸ *Khulasat-ul-Tawarikh*, p. 258.

⁹⁹ Elliot, *Wikaya*, Vol. VI, p. 169.

¹⁰⁰ *Ibid.*, p. 170.

agree to place Sultan Khusru on the throne." The conspiracy failed, but the passage gives a clear clue to the fact that Akbar some time overtly or covertly had made it known that he preferred Khusru to Salim. At least one of the occasions when such an opinion must have been expressed by Akbar was the death of Abul Fazal. He was extremely agitated and greatly displeased with Jahangir. Nothing short of supersession would have entered his head. Salim deserved it.

The conspiracy at the death-bed of Akbar is also an indication of the fact that Salim's fate in spite of the second declaration was hanging in the balance. Had not Akbar in his last moments put a final seal on his previous declaration, the situation would have become serious. The Emperor once more opened his eyes and signed to them to invest him (Salim) with the turban and robes which had been prepared for him and to gird him with his own dagger.¹⁰¹ The last ceremony of investiture was the third occasion when a silent but a very eloquent declaration was made with regard to Salim's succession. Saiyid Khan by his speech and tact nipped the conspiracy in the bud ; Akbar by his silent signal put an end to it.

From the story of Jahangir's succession, the power and place of the nobles in matters of succession can be easily inferred. The nobles had no direct hand in this thorny question. It was not their business to choose a king. The combination of the Saiyids of Barha, Muatamid Khan and Murtaza Khan, and Raja Ramdas Kachwaha was formed simply to counteract the compact and alliance of Khan-i-Azam and Raja Man Singh. It was not one of their objects to choose a successor. They thought that Salim had a title to the throne by virtue of his being the son of Akbar and that it was their duty to be faithful to him. Akbar had

¹⁰¹ *Ibid.*, p. 171.

already declared Salim twice as his successor. This was another thing in their favour. That is why they opposed Man Singh and Khan-i-Azam the supporters of Khusru.

If we read the speech of Raja Man Singh and Khan-i-Azam that has been given above, we shall come to the conclusion that the proposal to instal Khusru was not made in the spirit of a fresh proposal. Nor was it a counter suggestion that would have thwarted the intention of the dying Emperor. The whole argument of the passage has been based on the feeling of the Emperor towards Salim. They do not ask the assembly to do anything against the Emperor's wish. But as the Emperor was speechless and almost in the last agonies of death they considered it advisable to put before the assembly the likes and dislikes of the Emperor. Their argument in dispensing with Salim is somewhat like this. In superseding Salim they would be doing that very thing which Akbar himself wanted and which he himself would have done had he been in a conscious mood. For Akbar was extremely displeased with Salim and did not want him to be his successor. Their object in planning a seizure of Salim was the same, so that if the nobles agreed they could easily take the benefit of Akbar's displeasure. Unfortunately some of the nobles did not agree. The whole scheme fell. Salim was able to see his father who before his death forgave him and gave him the throne.

So to think that the nobles had a hand in deciding a succession would not be justifiable. The nobles as a class had grown into a body which registered the wishes of the Emperor even in the matter of succession.

An effort to be near the king's person at the time of his death is very prominent on the part of Salim. In 1603 after the reconciliation Salim was asked by Akbar to proceed towards Udaipur to vanquish the Rana. He proceeded immediately, but at Fatehpur-Sikri made all sorts of

excuses, wanted an increase in the equipment, complained of ill-supply of men and provisions, etc., and ultimately asked Akbar's permission to return to Allahabad after making his obeisance when Akbar permitted him to return. But if we examine carefully the reason that impelled Salim to desist from going, we shall see that something more than the ill-equipment and inefficient army was the cause of his avoidance. It was true that he did not want to endanger his reputation in wasting his time by undertaking an expedition which would fail. He was an ease-loving man, did not want to undertake anything that forced him to leave his cup and jug aside. Above all, he did not want to be absent from the capital at this period of the king's reign. He wanted to be near the king's person or at some place from where he could command the situation. Although there is no documentary evidence to establish this, yet this seems to be the probable reason of his return. The ill-equipment was or could be no excuse. The army could have been easily supplied with everything made as efficient as Salim wanted. But Salim's wish was something else. Akbar understood it very well. That is why he permitted him to return to Allahabad.

Salim's anxiety to see his father at the time of his death establishes our point. The conspiracy to seize Salim and thus check him from being near the king's person is another indication of the fact that nearness to the king's person at the time of his death had begun to play a great part in the destiny of a successor. When Salim avoided arrest and returned at the instance of Mir Zia-ul-Mulk he had become absolutely hopeless of his future. Asad in his *Wikaya* says : "The boat returned and His Royal Highness with weeping eyes and a sore heart re-entered his private palace."¹⁰² That Salim had become absolutely

¹⁰² Elliot, Asad's *Wikaya*, Vol. VI, p. 169.

hopeless of his chances of succeeding will be evidenced by the following sentence in the Wikaya :—

“ Salim was completely alarmed by his servants. Their evil councils were nearly taking effect on the Prince and he was about to order his private boats to save himself by flight when Shaikh Ruknuddin Rohilla . . . came and besought him to compose himself and wait two hours to see what would happen.”¹⁰³ Salim’s chances became cent. per cent. sure the moment he reached near the king’s person and touched his feet. He was declared Akbar’s successor and hailed as king immediately after his death. Thus we see that closeness to the king’s person had much to do in deciding the fate of Salim as Akbar’s successor.

(To be continued.)

¹⁰³ *Ibid.*, pp. 170-71.